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DEC 28
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 336.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

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IN THE

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OCTOBER TERM, 1929.

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York, *Appellants,* against Sparkill Realty Corporation and Standard Trap Rock Corporation, *Appellees.*	No. 336.

On Appeal From the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANTS.

The Opinion Below.

The opinion of the court below has not been reported. It is printed in the record submitted herewith at pages 87-97.

Jurisdiction.

The District Court for the Southern District of New York (three judges convened pursuant to Judicial Code, Section 266) has held void, under the due process clause, a statute of New York which pledges the entire credit of the State to pay for property taken by eminent domain for park purposes, and has granted an interlocutory injunction ousting the Park Commission from a possession enjoyed without disturbance for five months before the suit was commenced. The Commissioners and other officers of the State whom the injunction restrains appeal from this interlocutory decree.

The jurisdiction of this Court under Section 266, as set forth in a separate statement filed in accordance with the Rules, was not contested by appellees, and an application for an early hearing, made by all the parties, was granted (October 28, 1929).

Statement of Facts.

Duties and Powers of Palisades Interstate Park Commission:

The Board of Commissioners of the Palisades Interstate Park was created a body politic by Chapter 170 of the New York Laws of 1900, and by that act empowered

> "to select and locate such lands lying between the top of the steep edge of the Palisades and the exterior of the bulkhead line established by law upon the Hudson river, together with such separate parcels of unimproved lands lying on the front of the top of the Palisades from the New Jersey state line on the south to Piermont creek, near Piermont in Rockland county, on the north, as may in their opinion be proper and necessary to be reserved for the

purpose of establishing a state park and thereby preserving the scenic beauty of the Palisades."[1]

(In the same year New Jersey by similar legislation [N. J. L., 1900, ch. 87] created a corresponding commission in that State. There is no difference in the personnel of the two Commissions, the practice being for the governors of the two states to appoint the same commissioners [R., 57].)

In 1928 the Legislature of New York revised the Conservation Law of that State (N. Y. L., 1928, ch. 242, in effect March 5, 1928). The revising statute re-enacted the provisions of chapter 170 of the Laws of 1900, with certain changes and additions, as Part 9 of the new Conservation Law[2], and repealed the old Palisades Park Act along with the other park statutes consolidated in the revision.[3]

The original territorial limits of the Board of Commissioners' power had been extended by amendments of the creating statute,[4] and were further extended by §747[5] of the Conservation Law of 1928. At the time of the entry and appropriation in question, the area in New York subject to the Commission's power of eminent domain was thus defined:

"The board of commissioners shall continue to have power to and shall from time to time proceed to select and locate such lands from the New Jersey state line on the south to Piermont creek, near Pier-

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[1]N. Y. L., 1900, ch. 170, §4.

[2]N. Y. L., 1928, ch. 242, §41; see Appendix, pp. 27, 28-34.

[3]N. Y. L., 1928, ch. 242, §50; see Appendix, p. 35.

[4]By N. Y. L., 1906, ch. 691, and by L., 1910, ch. 361; see Appendix, pp. 9-10, 7.

[5]Added by N. Y. L., 1928, ch. 242, §41; see Appendix, pp. 27, 29-30.

mont in Rockland county, on the north lying between the highwater line of said river and the top of the steep edge of the palisades, or the crest of the easterly slope of the uplands overlooking said river where the steep palisade rocks are absent or lying on the front of said palisades or uplands, as may in their opinion be proper and necessary to be reserved for the purpose of establishing or extending a state park and thereby preserving the scenic beauty of the palisades and uplands or securing the same to the use of the public for park purposes; and said board of commissioners shall have the further power to, and shall, as soon as said board shall deem it feasible and advisable, proceed to select and locate such mountainous lands along and adjacent to the west bank of the Hudson river in Rockland and Orange counties, north of Piermont creek and south of the city of Newburgh, and other lands to the west thereof and extending into the Ramapo mountains, except the land comprised in the United States government reservation at West Point and the land comprised in the state reservation at Stony Point, and other lands now owned by the state of New York, as may in the opinion of said board of commissioners, be proper and necessary for the purpose of extending the limits of said state park and thereby preserving the scenic beauty of or securing to the use of the public for park purposes the mountainous lands along and adjacent to the west bank of the Hudson river in Rockland and Orange counties and other lands to the west thereof and extending into the Ramapo mountains north of the palisades."

From the beginning the Board had had the power of condemnation.[1]

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[1]See Appendix, pp. 13-19.

Section 761 of the 1928 Conservation Law empowered the board to use "in addition" another and more summary method—"to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law."[1]

This Section 59 of the Conservation Law (subds. 3, 4, 5, 7)[2] provides that the Conservation Department may, with the approval of the Governor, acquire lands for park purposes by filing in the office of the Secretary of State of New York a description of the property to be taken, with a notice endorsed thereon that the described property is appropriated by the People of the State of New York for park purposes, and by serving upon the owner of the lands a duplicate of this description and notice (subds. 3, 4, 5); upon such service the State's title becomes "complete" (subd. 5) and the owner has the absolute right at any time within two years from the date of the service of the notice to bring an action to recover his compensation in the New York Court of Claims and to have the amount of his judgment, with interest thereon, paid out of the State Treasury (subd. 7; see also New York Court of Claims Act, §25[3]).

Section 59 of the Conservation Law does not require that at the time of the entry and appropriation there shall be funds on hand for the acquisition of the prop-

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[1]See Appendix, p. 34.

[2]See Appendix, pp. 23-26.

[3]N. Y. L., 1920, ch. 922; see Appendix, pp. 55-62.

§14 of this statute analogizes the Court of Claims procedure to that of the Supreme Court of the State.

Article I, Section 7, of the New York Constitution and Article III, Section 19, supply the constitutional basis for the Court of Claims; Article I, Section 7 (Appendix, pp. 3-4), frees the State when appropriating property from the requirement that a jury shall fix the value; Article III, Section 19 (Appendix, p. 4), expressly empowers the Legislature to appropriate money to pay Court of Claims' judgments.

erty, or that funds shall have been appropriated by the legislature for its acquisition; and Section 761 (which gave the Commissioners of the Palisades Interstate Park the right to use the procedure of Section 59) imposes no such requirement.

The entry and appropriation:

The land which is the subject of this suit lies within the Southern District of New York and within the territorial limits of the Commission's power of eminent domain, as defined by the 1928 Conservation Law (R., 4; pp. 3-4, supra).

The property consists of Tallman Mountain, a conspicuous wooded elevation on the west bank of the Hudson at the north end of the Palisades, together with adjacent meadow land between the Mountain and the River (R., 4, 5, 30, 38, 43, 44, 47, 48, 50, 53).

Sparkill Realty Corporation was until the State appropriated on October 11, 1928 the owner of this property, and had in 1927 leased it for quarrying purposes to Standard Trap Rock Corporation for the period of twenty years (R., 4, 5, 11, 12), with a renewal privilege of twenty years (R., 17). Standard Trap Rock Corporation had made extensive preparations for its quarry and at the end of September, 1928, was about to begin actual excavation, which would necessarily involve the destruction of trees, the removal of surface soil and the permanent disfigurement of the cliff (R., 6, 44, 61).

The Palisades Interstate Park Commission, upon which its creating statute had imposed the duty of "preserving the scenic beauty of the Palisades," has from its inception deemed that it was under specific mandate

to prevent, so far as lay within its power and jurisdiction, the defacement of the west bank of the Hudson River by quarries (R., 58).

Negotiations for the purchase of the property failed completely. Appellees demanded at the outset $8,000,000 (R., 60) and never less than $3,000,000 (R., 31, 8) for property assessed at $15,000 (R., 60).

Until Section 747 of the revised Conservation Law, extending the geographical limits of the Commission's jurisdiction became effective on March 5, 1928 (supra, p. 3), there was doubt whether the property was within the Commission's power of eminent domain. And so as matters stood in 1927 the Commission was advised by its counsel (R., 60). In the fall of that year the Commission had to abandon the idea of compulsory acquisition and so notified appellees (R., 75-76). Counsel for the Trap Rock Company requested some amplification of the statement from the Commission's attorney, who declined to give it and explained that he could not predict what the Commission's attitude might be in the future (R., 60).

The appropriation was effected, as we have said, on October 11, 1928, by which time the geographical limits of the Commission's power had been extended, the right of entry and appropriation given to the Commission and large sums made available by the Legislature.

On October 9 the Board resolved to take the land by entry and appropriation (R., 61, 64) in the manner provided by Sections 59 and 761 of the Conservation Law as that year revised; on the following day the Governor and the Conservation Commissioner[1] gave

[1]As to the significance and effect of the Conservation Commissioner's approval, see page 11, infra.

their approval (R., 61, 72, 73-4). On October 11 the description of the property with the notice of appropriation was filed in the office of the Secretary of State of New York (R., 6-7, 61, 72-3) and copies served upon appellees (R., 43, 61-2, 6-7, 74-5).

The Commissioners of the Palisades Interstate Park then entered upon the property (R., 56, 62) and remained in possession until ousted by the interlocutory injunction (R., 7, 43, 56, 62, 82).

Funds available for appellees' compensation:

The extracts from the Conservation Law, to which reference has already been made, show that the whole credit of the State was pledged to the payment of any judgment the owners of the land might recover in the Court of Claims. Appellees have throughout this litigation treated the case as if it turned upon the amounts of money on hand with the Commission at the time of the appropriation. As to that matter these are the facts:

(1) Assets outside of bond moneys. On October 11, 1928, the Palisades Interstate Park Commission had on hand (in addition to bond issue money, as explained below) more than $500,000 in "moneys, securities and other properties which could be lawfully used for the acquisition of lands for park purposes in any manner" (R., 79).

(2) Bond issue moneys. In 1924 the New York Legislature had passed a measure[1] providing for a $15,000,000 bond issue, the proceeds to be put in the state treasury and used, "after appropriation or appropriations therefrom by the legislature," "for the development, improve-

[1]N. Y. L., 1924, ch. 602, §§1, 3—see Appendix, pp. 36-40.

ment and extension of state parks * * * including the acquisition of lands, and for the establishment of a unified state park system'' (R., 41, 7).

It is necessary under Article VII, Section 4 of the New York Constitution[1] that measures of this sort be submitted to and approved by the People of the State at a general election, and this bond issue act of 1924 was so submitted and approved at the general election held in November of that year (R., 7, 41).

Of the $15,000,000 state park system fund thus authorized, the referendum act itself apportioned $3,500,000 for the development, improvement and extension of the Palisades Interstate Park and for the acquisition of land therefor.[2] In 1926, by Chapter 16 of the Laws of that year, the Legislature accordingly appropriated this $3,500,000 to the Palisades Interstate Park Commission for these purposes[3] (R., 8, 41-2), with the provision—which the referendum act of 1924 likewise contained—that ''the moneys for the development, improvement and extension of the Palisades Interstate park shall be expended and the lands shall be acquired by the commissioners of the Palisades Interstate park under the provisions of chapter 170 of the Laws of 1900 as amended''[4] (R., 7, 41).

In 1928 the Legislature reappropriated the whole unexpended balance of the state park system fund—$11,912,850.58 (L., 1928, ch. 75, part 5)[5].

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[1]See Appendix, pp. 5-6.

[2]N. Y. L., 1924, ch. 602, §3; see Appendix, p. 38.

[3]N. Y. L., 1926, ch. 16, §1, subd. 2; see Appendix, p. 41.

[4]N. Y. L., 1924, ch. 602, §4, and L., 1926, ch. 16, §2, subd. 2; see Appendix, pp. 38, 44-5.

[5]See Appendix, p. 53.

The 1926 appropriation law (L., 1926, ch. 16, §4)[1] enacts that before any obligation for the expenditure of the bond moneys thereby appropriated be incurred, a map showing the location and extent of the proposed park, with an estimate of the cost of its acquisition and development, be submitted to and approved by the State Council of Parks, the Governor, the Chairman of the Senate Finance Committee, and the Chairman of the Assembly Ways and Means Committee. Accordingly maps and estimates for the acquisition of appellees' property along with other property in the towns of Clarkstown and Orangetown, in the County of Rockland, were presented to, and received the approval of, these officials on September 29, 1928 (R., 6, 34-5, 54-5). And these officials allocated $600,000 out of the $3,500,000 appropriation of bond issue moneys to cover the estimated cost of the acquisition of "any or all" of these lands (R., 34-35, 55).

(3) General funds of the State: Section 662 of the revised Conservation Law of 1928 makes the approval of the Conservation Commissioner a pre-requisite to the State Park Commissions' acquisition of real property with State moneys, other than moneys derived from the 1924 bond issue.[2]

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[1]See Appendix, pp. 48-9.

[2]"Real property shall not hereafter be acquired with state moneys by any such commission, commissioners, society, board, trustees, corporation, association or authority by condemnation or appropriation, except with the approval of the conservation commissioner; but this provision shall not apply to such acquisitions made or to be made pursuant to chapter sixteen of the laws of nineteen hundred and twenty-six relating to expenditures of the proceeds of state bonds authorized by chapter six hundred and two of the laws of nineteen hundred and twenty-four, and such chapter shall not be affected or impaired by this article." (See Appendix, p. 27.)

Before acquiring the Tallman Mountain property, the Commission sought and obtained, in addition to the approval of the other officials, the approval of the Conservation Commissioner (R., 61, 73-4; supra, pp. 7-8), and thereby brought all the resources of the State within that pledge of its general credit which section 59 of the Conservation Law gives.

Provisions of the New York Constitution concerning the appropriation of State funds:

There is no limitation upon the power of the New York Legislature to make an appropriation of money. There is simply the requirement (Article III, Section 21) that

> "No money shall ever be paid out of the treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum,"

and the provision in the same Article III (Section 19) expressly authorizing the Legislature to make appropriations to pay Court of Claims judgments:

> "The Legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law."

Proceedings in the District Court:

On March 19, 1929, five months after the Commission had taken possession, appellees began this suit against the Commissioners by the service of a bill of complaint (R., 3-11) and an order to show cause why an interlocutory injunction should not be granted (R., 1). The Attorney General and Conservation Commissioner of New York were joined as defendants by virtue of Section 68 of the Executive Law[1] and Section 9 of the Conservation Law[2] (R., 4, 87).

The bill of complaint attacks the entry and appropriation upon the allegations

> That on or about September 29, 1928, defendants, Board of Commissioners of the Palisades Interstate Park, and the Governor, the Chairman of the Senate Finance Committee, the Chairman of the Assembly Ways and Means Committee, and the State Council of Parks, "purporting to act under the provisions of section 4, chapter 16 of the Laws of 1926, and chapter 75, part 5 of the Laws of 1928 of the State of New York," approved maps and estimates for the acquisition of plaintiffs' property and other property in the Towns of Clarkstown and Orangetown and allocated the sum of $600,000 for the acquisition of this land, $500,000[3] of this $600,000 being al-

[1]N. Y. L., 1913, ch. 442, amending L., 1909, ch. 23.

[2]N. Y. L., 1911, ch. 647, §9, as amended by L., 1928, ch. 242, §3.

[3]How plaintiffs arrived at this figure, or what they mean by this allegation, does not appear. There was no separate allocation for plaintiffs' property and the very wording of the official document itself (R., 34, 55) made the full $600,000 available for the "acquisition of *any or all* lands (including lands under water) within the jurisdiction of the Commission, as defined by chapter 242, Laws of 1928, in the towns of Clarkstown and Orangetown, County of Rockland, State of New York, as shown on key map which is attached."

located to the acquisition of plaintiffs' property (R., 6).

That Article VII, Section 4, of the New York Constitution "forbids the creation of state debts save to meet casual deficits or for state defense unless authorized by statute submitted and approved by the people at a general election and only in accordance with such statute so approved" (R., 7).

That in accordance with this constitutional requirement, Chapter 602 of the Laws of 1924 was submitted to popular vote and was approved at the general election held in November, 1924 (R., 7).

That this referendum act allocated $3,500,000 for the Palisades Interstate Park (R., 7, 8) but provided that such moneys should be expended and lands acquired under "the provisions of Chapter 170 of the Laws of 1900 as amended" (R., 7).

That Chapter 170 of the Laws of 1900 contained no provision for the acquisition of lands by entry and appropriation, and was wholly repealed by Chapter 242 of the Laws of 1928, which authorized the Commission to take land by entry and appropriation (R., 7); that "the attempted allocation of $500,000 to such acquisition of said property is therefore void and of no effect, and no sum whatever has been appropriated for the acquisition of plaintiffs' property by entry and appropriation" (R., 7).

That the appropriation of the $3,500,000 by Chapter 16 of the Laws of 1926 had lapsed before October 11, 1928, for the alleged reason that Chapter 75, part 5 of the Laws of 1928, purporting to reappropriate this sum, did not comply with the requirements of Article III, Section 21, of the New York Constitution in that it failed to specify the object to which the amount appropriated was to be applied (R., 7-8).

The bill prays

> That the notice of appropriation, and the acts of defendants thereunder, be adjudged invalid as violative of the contracts clause of the Constitution of the United States (a contention subsequently abandoned), and of the due process clause of the Fourteenth Amendment, and of the due process and just compensation clause of the New York Constitution, and of the provision of the New York Constitution for a referendum upon state bond issues (R., 9);
>
> Further, "that it be adjudged that Chapter 75, Part 5, of the Laws of 1928, in so far as it relates to the 'State Park System Fund' and the reappropriation of $11,912,850.58 is invalid as violative of the provisions of Section 21, Article III, of the Constitution of the State of New York" (R., 10);
>
> Finally, that the defendants be enjoined from "enforcing * * * the provisions" of Chapter 242 of the Laws of 1928 against plaintiffs, *"or from continuing in possession of plaintiffs' said property"* (R., 10).

Proceedings upon the application for Interlocutory Injunction under Judicial Code, Section 266:

The order to show cause (which, together with the supporting affidavits, was served with the bill of complaint) provides that the application for interlocutory injunction "be heard before a court constituted in the manner prescribed by section 266 of the Judicial Code of the United States" (R., 1).

Appellees' affidavits put their objection to having funds derived from the 1924 bond issue applied to their compensation upon the ground that it was the original Palisades Park Act (L., 1900, ch. 170) to which the Referendum Act of 1924 referred, and that after this statute was repealed by chapter 242 of the Laws of 1928, "there-

after there was no statute under which moneys realized from the bonds authorized by Chapter 602 of the Laws of 1924 could be expended in the acquisition of land by the Commissioners of the Palisades Interstate Park" (R., 42).

The affidavits in support of the application make it clear that the $3,000,000 valuation claimed in the bill is based upon the estimated cubic contents of the cliff (R., 46, 53) and upon estimates of the yearly profits of the quarry after it might have come into operation (R., 36-7, 43, 44, 48-9, 50-51); also that the contractual liability of $1,000,000 alleged to have been incurred in the erection of the plant (R., 6), included machinery to be installed in the future as well as machinery already installed (R., 40, 43-4, 52).

Appellants' affidavits in opposition, both executed by Mr. White (a member of the Commission since its inception in 1900, and since 1921 its President [R., 58]) show that the State's taking was confined to real property and that machinery, tools and equipment were permitted to be removed, and were removed, when the State took possession (R., 62, 63, 77).

Mr. White further shows that the Commission's estimate of value—based upon long familiarity with this tract and recent and repeated inspections, and verified by technical advice and data, as well as by its own official experience in appraising quarry properties in this locality (R., 58-9, 63)—was that the property was worth less than $600,000, and that it was upon this estimate that the $600,000 allocation of bond moneys had been obtained. Mr. White also states that the assessed value of this property for tax purposes was only $15,000 (R., 60; supra, p. 7).

Appellees' application for interlocutory injunction and appellants' motion to dismiss—for lack of jurisdic-

tion, for failure to state a cause of action, and for lack of equity (R., 79-81)—were heard together. On June 7, 1929, the three judges of the statutory court rendered an opinion denying the motions to dismiss and granting the interlocutory injunction (R., 86-97).

The decree recites (R., 82) that the Court is

> "of opinion that the provisions of chapter 242 of the laws of 1928 of the state of New York, if so construed as to vest in defendant, Board of Commissioners of the Palisades Interstate Park, power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law of said state and all acts of defendants pursuant thereto, in the absence of funds separately appropriated by the legislature of said state in such an amount as to be reasonably certain to cover an award which may reasonably be made for said lands, are invalid as violative of the provisions of Section 1, Article XIV of the articles in addition to and amendment of the Constitution of the United States of America and of Section 6, Article I and Section 4, Article VII of the Constitution of the State of New York, and that no appropriation of funds has been made by the said legislature for said purposes,"

and provides (R., 82) that

> "Pending final decree in this action and until the further order of this Court the defendants and each of them and each of their officers, agents, servants and employees, their successors in office and any and every person acting or purporting to act under or by virtue of Chapter 242 of the Laws of 1928 of the

State of New York or a certain notice, description or certificate of defendants, Board of Commissioners of Palisades Interstate Park, dated October 11, 1928, with reference to the property hereinafter described be and hereby are enjoined and restrained, jointly and severally, from in any way enforcing or attempting to enforce the provisions of said act, notice, description or certificate against plaintiffs by entry and appropriation as aforesaid or from instituting or prosecuting any action or proceeding at law or in equity by summons, writ, petition, bill or otherwise for the purpose of compelling compliance with or inflicting or recovering any penalty, forfeiture or damage for noncompliance by plaintiffs with said act, notice, description or certificate or *from continuing in possession of plaintiffs' said property,"*

and further restrains defendants (R., 86)

"from doing any acts or things as aforesaid which may in any respect interfere with the ownership or possession of the plaintiffs of the aforesaid property or their free use and enjoyment thereof."

Specification of Errors.

Appellants will urge all the errors assigned (R., 99-104) except 4, which is withdrawn.

Outline of Argument.

The District Court should have dismissed the bill for lack of jurisdiction, because

(I) This Court has settled the principle that the pledge of the full faith and credit of the sovereign—which Section 59 of the New York Conservation Law

gives—is sufficient assurance of just compensation, and (II) that pledge is not limited or qualified by anything in the Constitution or Statutes of the State;

(III) Appellees' objections to being compensated out of bond moneys are groundless as matter of state law;

(IV) Appellees will not be injured by being compensated from this source and are therefore without standing to object;

(V) The absence of an adequate appropriation is not shown—still less the absence of adequate funds—so that the supposed federal question is merely hypothetical;

(VI) There is no basis for injunctive relief and therefore no equity in the bill: Appellees were out of possession, appellants in possession, when suit was brought. The suit is in reality an ejectment action and therefore beyond the jurisdiction of the Statutory Court and of the Federal Court on either the equity or the law side.

(VII) The District Court should have dismissed the bill for want of merit.

(VIII) The Statutory Court erred in holding Section 59 of the New York Conservation Law invalid under the due process and just compensation clause of the New York Constitution.

(IX) The interlocutory decree giving possession and unrestrained control of the property was clearly erroneous.

POINT I.

That the pledge of the general credit of the state assures just compensation and satisfies the constitutional requirement of due process has been decided so often by this Court that a contention to the contrary does not raise a substantial federal question.

The question of the jurisdiction "of the court from which the record comes" is "fundamental"; it "presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not" (*Defiance Water Co.* vs. *Defiance*, 191 U. S., 184, 194).

> *Louisville, etc., Co.* vs. *Mottley*, 211 U. S., 149, 152;
> *Great Southern Fire Proof Hotel Co.* vs. *Jones*, 177 U. S., 449, 453;
> *Mansfield, etc., Ry. Co.* vs. *Swan*, 111 U. S., 379, 382.

Diversity of citizenship admittedly does not exist (R., 3-4). The District Court assumed jurisdiction upon the theory that the suit was one arising under the Constitution of the United States (Judicial Code, §24, subd. 1; U. S. C. A., §41, subd. 1). "The jurisdiction of this court," as Judge Manton said (R., 90),

> "is invoked upon the claim that the plaintiffs' property is being taken without due process in violation of the 14th amendment of the Federal Constitution. That no certain and adequate method of making compensation to the plaintiffs is shown because *the statute* under which the entry and appropriation was made *relegates the plaintiffs to the Court of Claims of the State, but fails to appropriate money to pay*

> *for the property.* Also that it does not sufficiently pledge the credit of the State; even though the Court of Claims of the state be fully vested by the statute with jurisdiction to determine the amount of compensation, *there is no appropriation by the legislature of such an amount as to be reasonably certain to cover an award that may reasonably be made."* (Our italics.)

And it was precisely this "claim" that the Statutory Court sustained (see the recital of the decree—R., 82-3, quoted above at pp. 16-17).

But the statute under which appellees' property was taken, at the same time that it gave the Commission the right to enter and appropriate, gave the landowner the right to sue in the New York Court of Claims and obtain judgment there against the State for the full value of his land, and to have that judgment paid out of the State Treasury. The express provision of the statute is that upon filing in the office of the Conservation Department

> "and in the office of the comptroller, a certified copy of the judgment of the court of claims, and a certificate of the attorney-general that no appeal from such judgment has been, or will be taken, by the state, or if an appeal has been taken, a certified copy of the final judgment of the appellate court affirming in whole or in part the judgment of the court of claims, *the comptroller shall issue his warrant for the payment of the amount due the claimant by such judgment, with interest from the date of the judgment until the thirtieth day after the entry of such final judgment, and such amount shall be paid out of the state treasury."*[1]

[1] N. Y. Conservation Law, §59, subd. 7; see Appendix, p. 26.

Repeated decisions of this Court foreclose any contention that the express pledge of the full faith and credit of the State fails to satisfy the due process requirement of just compensation.

Sweet vs. *Rechel*, 159 U. S., 380;
Backus vs. *Fort Street Union Depot Co.*, 169 U. S., 557;
Adirondack Ry. Co. vs. *New York*, 176 U. S., 335, affirming 160 N. Y., 225;
Williams vs. *Parker*, 188 U. S., 491;
Crozier vs. *Krupp*, 224 U. S., 290;
Bragg vs. *Weaver*, 251 U. S., 57;
Hays vs. *Port of Seattle*, 251 U. S., 233;
Joslin vs. *Providence*, 262 U. S., 668;
Pauchogue Land Corporation vs. *Long Island State Park Commission*, 248 N. Y., 635; certiorari denied, 278 U. S., 657.

This is the basic principle and decisive of this case. We analyze in their order the rulings of this Court in the cases listed:

Sweet vs. *Rechel* involved a Massachusetts statute which permitted the City of Boston to take by entry and appropriation (see 159 U. S., at 382) the land needed for a drainage project and gave the owner the right to bring suit against the city and issue execution against it upon the judgment so recovered. Noting that the Massachusetts Constitution[1] contains no requirement that com-

[1]Like the New York Constitution. See for instance

Jerome vs. *Ross*, 7 Johns. Ch. 315 (Kent, C.);
Rogers vs. *Bradshaw*, 20 Johns., 735 (Kent, C.);
People vs. *Adirondack Ry. Co.*, 160 N. Y., 225;
Kahlen vs. *State*, 223 N. Y., 383;
Pauchogue Land Corp. vs. *Long Island State Park Commission*, 243 N. Y., 15, 24; 248 N. Y., 635.

pensation be paid in advance, and turning to the due process question under the Fourteenth Amendment Mr. Justice Harlan said (p. 402):

> "It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process."

Judge Harlan proceeded to distinguish various cases in which the eminent domain statute required compensation to be paid before title passed from the owner, and—with respect to the constitutional question—concluded (p. 407):

> "We are of opinion that, upon both principle and authority, it was competent for the legislature, in the exercise of the police powers of the Commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate."

In *Backus* vs. *Fort Street Union Depot Co.*, Mr. Justice Brewer, citing and reaffirming *Sweet* vs. *Rechel*, authoritatively defined the meaning of "due process" in its relation to the eminent domain power of the State (169 U. S., at 569):

> "All that is essential is that in some appropriate way, before some properly constituted tribunal, in-

quiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution.'"[1]

Adirondack Railway Co. vs. *New York*, the next case in chronological order, involved the Adirondack Park Act of New York,—the parent statute in the series of enactments whereby the park system of the State has been built up and the statute whose place the Conservation Law now takes. The Adirondack Park Act (precisely like §59 of the Conservation Law) provided that notice of the State's taking should be served upon "the owner of any real property so appropriated" and that "from the time of such service the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be conclusive evidence of an entry and appropriation by the State" (176 U. S., at 338 and 348).

It was the railway's contention that its "vested right" was violated by the state's acquisition of the land without giving it "any notice whatsoever or opportunity to be heard, and without the making of any compensation therefor" (p. 342).

Fuller, C. J., writing for an unanimous Court, and "agreeing with the New York Court of Appeals" (160 N. Y., 225) and quoting its opinion at length, held the plaintiff without standing to urge the question of notice.

Of the statute's provisions for compensation, he said:

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[1]The Statutory Court misconceived both *Sweet* vs. *Rechel* and *Backus* vs. *Fort Street Union Depot Co.*, citing them for a doctrine exactly opposite to the decisions rendered and the principle laid down (R., 94-5).

"Compensation must indeed be made, and inquiry as to its amount in some appropriate way, before some properly constituted tribunal, must be provided for, *Backus* vs. *Union Depot Company,* 169 U. S., 557, and it is the rule in New York that where this is done, and a certain, definite and adequate source of payment is provided, compensation need not actually be made in advance of a taking by the State or one of its municipal subdivisions. *In the Matter of the Mayor, &c.,* 99 N. Y., 569; *Sweet* vs. *Rechel,* 159 U. S., 380, 400.

"This act fulfils these requirements in that the state treasury is the source of payment, and an appropriate mode is designated for the ascertainment of compensation as to owners and those holding liens and incumbrances" (176 U. S., at pp. 349-50—our italics).[1]

Williams vs. *Parker* sustained a Massachusetts statute limiting the height of buildings in the Copley Square district of Boston, and providing that any owner of buildings under construction at the time of the enactment who suffered damage by its enforcement, "may recover such damage or loss from the City of Boston by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city" (188 U. S., at 492-3). The attorney-general of Massachusetts began a proceeding to enforce this statute against certain buildings; the owners opposed the application, showing that they had started suits against the City of Boston to recover their damages and that the City resisted the claims

[1]The Statutory Court cited this case too for a doctrine opposite to its decision (R., 94-5). From the citation it would appear that this Court, instead of sustaining the State's entry and appropriation in the *Adirondack* case, had held it void.

and had entered a general denial in the actions. They contended that the enforcement of the statute against their property ought to be "stayed until the City's liability could be conclusively determined" (p. 493). The City was "not a party to the proceedings" to enforce the statute and "therefore not estopped to deny its liability by reason of having sought and obtained the condemnation" (p. 503).

Even upon these peculiar facts, Mr. Justice Brewer, writing for an unanimous Court, sustained the enactment upon the authority of *Backus* vs. *Fort Street Union Depot Co.* and cases therein cited. He said (pp. 503; 504):

> "No question is made as to the general solvency of the city of Boston.[1] Although in the agreed facts it is stated that the city has no 'moneys specially appropriated to any such purpose as that prescribed by the damage clauses of this statute, nor any express statutory power or authority to raise, appropriate or pay money for such a purpose,' yet as this statute provides that 'any person sustaining damage * * * may recover such damage * * * in the manner prescribed by law for obtaining payment for damages by any person whose land is taken in the laying out of a highway'; and as there is a general statute making suitable provision for such a recovery, the question of solvency does not seem to be material."

And again:

> "That there may be novel questions in respect to the measure of damage, the value of the property

[1]It is hardly necessary to say that in the present case "no question is made as to the solvency" of the State of New York. Since the enactment of its income tax law in 1919, New York has made three reductions in the income tax rate (N. Y. L., 1919, ch. 627, amended L., 1924, ch. 27; L., 1925, ch. 196; L., 1926, ch. 209).

> that is taken, does not avoid the fact that a solvent debtor, one whose solvency is not liable to go up or down like that of an individual, but is of substantial permanence, is provided, as well as a direct and appropriate means of ascertaining and enforcing the amount of all such damage."

Noting "the prior decisions of the Supreme Court of the State as well as that in this case," Judge Brewer declared (pp. 504; 505) this Court's "opinion":

> "It cannot be held that there was a failure to make adequate provision for the payment of the damages sustained."

And again:

> "The statute in question cannot be adjudged in conflict with the Federal Constitution."

Crozier vs. *Krupp* is as plain a ruling as could ever be made:

Krupp, the German munitions manufacturer, sought to enjoin General Crozier from using its patents in the manufacture of ordnance. At the time suit was brought and indeed until after the decision of the Court of Appeals of the District of Columbia sustaining the bill, this was the only redress the plaintiff could have. For the federal statutes up to that time permitted no action against the United States for the use of a patent unless a contract to pay could be implied (see 224 U. S., at p. 304).

While General Crozier's appeal to this Court was pending, Congress passed a law providing that when a patent was "used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation by suit in the Court

of Claims.'"[1] This Court held that the new enactment was in substance a provision "for the appropriation of a license to use the inventions, the appropriation thus made being sanctioned by the means of compensation for which the statute provides" (p. 305).

Whether the provision for compensation was adequate was then considered. "This inquiry may be solved," Chief Justice White said, "under the conditions here involved, *by taking the most exacting aspect* of the well established and indeed elementary requirements in favor of property rights essential to be afforded in order to justify the taking by government of private property for public use" (p. 305—our italics). Examining these requirements from this angle—in their "most exacting aspect"—he stated them as follows (p. 306):

> "Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking—that is, that the amount should be ascertained and paid in advance of the appropriation—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation; second, that, again always having reference to the nature and character of the property taken, its value and the surrounding circumstances, *the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation—that is, by the pledge, either expressly or by*

[1]Act of June 25, 1910, 36 Stat., c. 423, p. 851, quoted 224 U. S., at 302-3.

necessary implication, of the public good faith to that end.'[1] (Our italics.)

It was therefore held that (although the original taking and use of the patents was without any statutory warrant and clearly unlawful) no action to restrain their use could be maintained after the enactment of the law that gave the owner the right to sue the United States and recover compensation in the Federal Court of Claims. In the concluding paragraph of his opinion (p. 308), Chief Justice White said:

> "Clearly under the circumstances now existing, that is, the acquiring by the Government under the right of eminent domain, as the result of the statute of 1910, of a license to use the patented inventions in question, there could be no possible right to award at the end of a trial the permanent injunction to which the issue in the case was confined. Moreover, taking a broader view and supposing that a final decree granting a permanent injunction had been entered below, in view of the subject-matter of the controversy and the right of the United States to exert the power of eminent domain as to that subject, at most and in any event the injunction could rightfully only have been made to operate until the United States had appropriated the right to use the patented inventions, and as that event has

[1] Judge Manton seized upon Chief Justice White's references to the character of the property taken and to the circumstance that the use only was appropriated, as a basis for distinguishing the case at bar involving the fee of real estate (R., 95-6). But a taking of "'the use and value,'" as Mr. Justice Pitney ruled in *U. S.* vs. *Cress* (243 U. S., 316, 328, quoting Brewer, J., in *U. S.* vs. *Lynah*, 188 U. S., 445, 470) "'must be regarded as an actual appropriation.'" And *Crozier* vs. *Krupp* has been recognized as authority in later cases involving the appropriation of the fee of real property (*Joslin Co.* vs. *Providence*, 262 U. S., 668, 677; *Bragg* vs. *Weaver*, 251 U. S., 57, 62).

happened the injunction, if granted, would no longer have operative force."

Accordingly the decision of the District of Columbia Court of Appeals, although right upon the facts as they were at the time of its rendition, was reversed by this Court upon the facts as they had come to be.

Since the *Crozier* decision the principle has been recognized as so well established that subsequent rulings in this Court have taken the form of brief statements citing the earlier decisions.

In *Hays* vs. *Port of Seattle* the plaintiff had had a contract with the State of Washington under which he was to improve a waterway in Seattle Harbor. Subsequently, the Legislature created the Port of Seattle a corporate body with territorial limits that included this waterway, and a year or two later the Legislature enacted a statute (Sess. Laws 1913, p. 195) vacating the project upon which plaintiff was employed and vesting the title to the waterway in the Port of Seattle. The plaintiff sought to have the enforcement of this statute enjoined "upon the ground (a) that it impaired the obligation of an existing contract between him and the State in violation of §10 of Art. I of the Constitution of the United States; and (b) that it deprived him of property without due process of law, contrary to §1 of the Fourteenth Amendment" (251 U. S., at 234).

The Washington Code authorized "any person having a claim against the State to begin an action thereon in a

designated court upon the mere giving of security for costs," the action "to proceed in all respects as other actions, with a right of appeal to the Supreme Court[1], and, in case of a final judgment against the State, a transcript of it is to be furnished to the Auditor of State, who is required thereupon to 'audit the amount of damages and costs therein awarded, and the same shall be paid out of the state treasury'" (251 U. S., at 238):

Citing *Bragg* vs. *Weaver* in the same volume (251 U. S., 57, where *Sweet* vs. *Rechel, Backus* vs. *Fort Street Union Depot Co., Adirondack Railway Co.* vs. *New York, Williams* vs. *Parker* and *Crozier* vs. *Krupp* were all cited), Mr. Justice Pitney sustained the statute with the brief statement (p. 238):

> "This statute constitutes an adequate provision for assured payment of any compensation due to complainant without unreasonable delay; and hence satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking."[2]

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[1]For the right of appeal in New York from the Court of Claims to the Appellate Division and the Court of Appeals, see Court of Claims Act, appendix, p. 61, and for an illustration, see *Rockaway Pacific Corp.* vs. *State of N. Y.*, 243 N. Y., 556.

[2]The Port of Seattle legislation carried no appropriation; the procedural provisions of the Washington Code for suits against the State of course carried none; the briefs of counsel make no reference to any appropriation, and we are unable to find any appropriation for the purpose of paying judgments arising out of the Seattle improvement in any statutes down to and through the date of the decision.

Judge Manton completely misconceived *Hays* vs. *Port of Seattle*:

He thought that the "only question" there was the question under the contracts clause (R., 97). As we have seen from the extracts quoted, the due process clause also was invoked and the question of due process expressly decided against the plaintiff by this Court.

In *Joslin Co.* vs. *Providence*, Mr. Justice Sutherland thus stated the principle and listed the authorities that had established it (262 U. S., at 677):

> "It has long been settled that the taking of property for public use by a State or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge. *Sweet* vs. *Rechel*, 159 U. S., 380, 400, 404, 407; *Williams* vs. *Parker*, 188 U. S., 491, 502-503; *Crozier* vs. *Krupp*, 224 U. S., 290, 306; *Bragg* vs. *Weaver*, 251 U. S., 57, 62; *Hays* vs. *Port of Seattle*, 251 U. S., 233, 238; *Adirondack Ry. Co.* vs. *New York*, 176 U. S., 335, 349."[1]

Pauchogue Land Corporation vs. *Long Island State Park Commission* shows the application of the principle thus settled to the precise Section 59 of the Conservation Law here involved. There were two opinions of the Court of Appeals (243 N. Y., 15 and 248 N. Y., 635), each dealing with a different appropriation.

The former of these opinions was rendered upon plaintiff's pleading attacking the earlier appropriation. Plaintiff by its complaint alleged—and defendants by their motion to dismiss the complaint admitted—that at the time of that appropriation the Long Island Commission had no moneys on hand. Upon this admitted fact, plaintiff contended that the entry and appropriation was invalid both as matter of constitutional and of statutory law. The Court of Appeals expressly overruled the constitutional objection, finding the pledge of

[1]That the Statutory Court misconceived this case too, see *infra*, p. 45.

the general credit of the State, given by Section 59, a complete answer (243 N. Y., at pp. 24-5). It did sustain the objection based upon a provision of the Long Island State Park Act.[1]

During the pendency of the litigation, a private donor gave the Commission $262,000 for the express purpose of acquiring the particular property. This sum represented the Commission's estimate of the value; the landowner's estimate was several times greater. After receiving the gift, the Commission made a second appropriation, which the Court of Appeals, citing and relying on its earlier opinion, sustained against all objections (248 N. Y., 635).

The Pauchogue Land Corporation sought to have this determination reviewed by this Court, urging that the existence of a legislative appropriation of moneys was a requirement of due process.

Chief Judge Cardozo denied the application for leave to appeal with the endorsement:

> "It does not appear that any substantial federal question is involved."

Justices Stone and Brandeis both heard oral argument upon the same application and both denied it; the whole Court refused *certiorari* (278 U. S., 657).[2]

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[1]The Long Island State Park Act, §8 (now §777 of the Conservation Law) gave the Long Island Commission "power *from moneys or property on hand or appropriated for its use* to acquire and make available for use as public parks or parkways all such real estate as is or may come under its jurisdiction." (There is no such limitation upon the Palisades Commission.)

[2]That the Statutory Court misconceived the *Pauchogue* case and the whole line of New York authorities, see Point VIII infra, especially pp. 73-74.

Appellees' contention—that an exercise of the state's power of eminent domain violates the due process clause of the federal constitution unless there has been an antecedent appropriation in an amount reasonably sufficient to pay any award that the owner may subsequently recover—is then foreclosed by the long line of decisions in this Court.

There was no antecedent appropriation in any sum in *Williams* vs. *Parker*, none in *Crozier* vs. *Krupp*, none in *Hays* vs. *Port of Seattle*. In the first of these cases this Court sustained a taking by the City, in the second a taking by the United States, in the third a taking by the State.

One who would make out a case arising under the Constitution of the United States must show a substantial federal question (*Cuyahoga Co.* vs. *Northern Ohio Co.*, 252 U. S., 388, 397; *Newburyport Water Co.* vs. *Newburyport*, 193 U. S., 561, 579). A question that this Court has declared to be "long settled" (*Joslin Co.* vs. *Providence, supra*), cannot be substantial.

Merriam Co. vs. *Syndicate Publishing Co.*, 237 U. S., 618, 621, 624;
Equitable Life Assurance Society vs. *Brown*, 187 U. S., 308, 311;
Trenton vs. *New Jersey*, 262 U. S., 182, 192;
Wick vs. *Chelan Electric Co.*, 50 Sup. Ct. Rep., 41, decided Nov. 25, 1929.

POINT II.

Every provision of the New York Constitution and statutes that the Court below took as a reason for rejecting the principle settled by this Court, is in reality but an additional reason for applying that principle.

(1) *No antecedent appropriation can assure payment of the Court of Claims' award. Except in rare cases any antecedent appropriation would have lapsed before the award could be made.*

The precise proposition the Statutory Court decided was that Section 59 was invalid unless the entry and appropriation was preceded by an appropriation of funds reasonably adequate to pay the value of the land as subsequently determined by the Court of Claims. But no such antecedent appropriation could give any assurance of *payment:*

Any appropriation of funds by the New York Legislature lapses after two years[1],—as plaintiffs' own pleading alleges (R., 8). And the owner of lands taken by entry and appropriation has exactly two years after service of the notice within which to *commence* his suit for compensation in the Court of Claims[2]. The Court of Claims Act gives either side the right of appeal[3]. So that in almost every instance the provision of funds actually to pay for the land must rest with a subsequent legislature.

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[1]Article III, §21; Appendix, p. 4.

[2]N. Y. Conservation Law, §59, subd. 7; Appendix, p. 25.

[3]N. Y. Court of Claims Act, §29; Appendix, p. 61.

(2) *Neither could an antecedent appropriation assure full compensation. That assurance only the pledge of the full faith and credit of the state can give.*

Even where the eminent domain statute requires that reasonably adequate funds be on hand when the property is taken (as does the Long Island State Park Act, supra, p. 32), the Court of Appeals has recognized the impossibility of any preliminary estimate being infallible, and the consequent necessity of falling back upon the pledge of the State's credit in order to insure *full* compensation. Thus Judge Pound, even when enforcing the statutory limitation imposed upon the Long Island Commission, took pains to say (243 N. Y., at 27):

> "It by no means follows that if the amount of money appropriated by the Legislature is inadequate fully to pay the judgment of the Court of Claims, compensation is not sufficiently provided for to meet constitutional demands and that an act of appropriation of lands is, therefore, *ultra vires* and void. The amount appropriated is a qualified limitation upon the power to act. Public officials are presumed to act within their authority and if they in good faith and with authority of law appropriate lands found by the Court of Claims to be of greater value than the amount actually appropriated therefor, *the credit of the State may be pledged to meet the deficiency.* Otherwise the whole plan of appropriation by entry or condemnation would be dependent on the infallibility of the public officials in estimating the true value of property taken by them for State purposes."

It is only the State's promise to pay—only the pledge of the "credit of the State"—that can assure compensation in full.

(3) *Article III, §21 of the New York Constitution imposes no limitation upon the Legislature's power to make appropriations.*

Judge Manton (R., 94; see also 88) cited and seemed to rely heavily upon the sentence of Article III, Section 21, which reads:

> "No money shall ever be paid out of the Treasury of this State or any of its funds or any of the funds under its management, except in pursuance of an appropriation by law."

This sentence imposes no limitation upon the power of the Legislature to make appropriations to pay Court of Claims' judgments and no limitation upon its power to appropriate for any purpose. It simply insures that the Legislature and no other body shall make appropriations. The provision does not qualify or limit in any way the unequivocal promise to pay out of the State Treasury which Section 59 of the Conservation Law gives. It is the exact equivalent of the provision in the Constitution of the United States (Article I, Section 9, clause 7) that "no money shall be drawn from the Treasury but in Consequence of Appropriations made by law." That provision did not derogate from the assurance of just compensation which this Court found in *Crozier* vs. *Krupp*. And the Constitution of the State of Washington—whose enactment this Court sustained in *Hays* vs. *Seattle*—contained a provision (Art. VIII, §4) identical with Article III, Section 21.

The only restriction the New York Constitution puts upon the State's power of eminent domain is that "private property" shall not "be taken for public use without just compensation" (Art. I, §6, appendix, p. 3).

It is therefore the duty of the Legislature to appropriate whatever sum is needed to compensate the owner after the amount of just compensation has been fixed. As Chancellor Kent said in the first great decision establishing the constitutionality of the appropriation practice (*Rogers* vs. *Bradshaw*, 20 Johns., 735, 745):

> "This equitable and constitutional title to compensation undoubtedly imposes it as an absolute duty upon the legislature to make provision for compensation whenever they authorize an interference with private right."[1]

And Article III, Section 19, expressly authorizes the Legislature to perform this duty:

> "The Legislature shall neither audit nor allow any private claim or account against the State, *but may appropriate money to pay such claims as shall have been audited and allowed according to law.*"

(4) *The allocation of funds by administrative officers cannot limit the Court of Claims in making its award or the Legislature in making appropriation to pay the award.*

Judge Manton asserted (R., 91-2)—what the bill of complaint had assumed (R., 7-8)—that the amount of compensation recoverable "was limited to some part of $600,000 which was allocated to the Palisades Interstate Park."

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[1]Compare upon the relation between the due process and just compensation section (Article I, 6) of the New York Constitution, and the next section (Article I, 7) authorizing the determination of claims against the State without a jury, and thereby authorizing the determination of compensation by the Court of Claims, Vann, J., in *People* vs. *Adirondack Railway Co.*, 160 N. Y., 225, 237-8.

This is wholly wrong:

The utmost effect the allocation could have would be to limit the amount of *bond issue moneys*[1] available until a further allocation was made. The *Pauchogue* case flatly decided that even where the presence of reasonably adequate funds was by statute made essential to a valid entry and appropriation, the amount of funds on hand cannot affect the State's absolute obligation to pay the full value of the property (supra, p. 35). Still less can the State's obligation and promise to pay in full be limited by a preliminary estimate of the probable cost to the State made by administrative officials,—and that is what an allocation is. Just this the latest of the Long Island Park cases—*Flagg* vs. *Moses*—expressly held. In that case "the defendants had at their disposal for the purchase of park lands on Long Island, $190,000, and allocated for the particular site here involved the sum of $149,500" (132 Misc., 494, 495). "At the trial the plaintiffs' experts placed the value upon the land taken far in excess of the estimate of the defendants" (p. 496). Judge Humphrey, quoting the same language of Judge Pound's that we have quoted (supra, p. 35), sustained the entry and appropriation, saying (pp. 496-7):

> "The foregoing expression by the Court of Appeals applies the test of good faith on the part of the Commissioners. If the defendants are sustained in the act of taking, the plaintiffs through the Court of Claims, will receive the full value of their lands at the time of taking without regard to the sum available to the Commissioners at the time of entry.
>
> I find that the Commissioners did act in good faith,

[1]That the requirement of allocation contained in the 1926 Appropriation Act was confined to the bond moneys and that with respect to the other resources of the State only the approval of the Conservation Commissioner was required and that that approval was had, see supra, pp. 10-11.

and that the test of reasonable adequacy applied in the *Pauchogue* case was present here.

The foregoing is sufficient to defeat the plaintiffs' cause of action."

The Appellate Division unanimously affirmed Judge Humphrey's decision (225 App. Div., 887) and the Court of Appeals declined to review it (April 23, 1929).

The notion that the amount allocated in advance by administrative officials or even the amount appropriated in advance by the Legislature can operate as a limitation upon the owner's ultimate recovery has thus been expressly rejected by the New York courts in the recent park litigations in that State. And this Court, when it considered and sustained the Rock Creek Park legislation of Congress, took the same view (*Shoemaker* vs. *United States*, 147 U. S., 282, 302):

"The validity of the law is further challenged because the aggregate amount to be expended in the purchase of land for the park is limited to the amount of $1,200,000. It is said that this is equivalent to condemning the lands and fixing their value by arbitrary enactment. But a glance at the act shows that the property holders are not affected by the limitation. The value of the lands is to be agreed upon, or in the absence of agreement, is to be found by appraisers to be appointed by the court. The intention expressed by Congress, not to go beyond a certain aggregate expenditure, cannot be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property. It is not unusual for Congress, in making appropriations for the erection of public buildings, including the purchase of sites, to name a sum beyond which expenditure shall not be made, but nobody ever thought that such a limitation had any-

thing to do with what the owners of property should have a right to receive in case proceedings to condemn had to be resorted to."

(5) *Section 50 of the Conservation Law has no application to the Palisades Park Commission.*

Section 761 of the Conservation Law declares that the Palisades Park Commission "in addition" to other methods of acquisition "shall have the power to acquire lands by entry and appropriation in the manner provided for in Section 59." To no other section does Section 761 make the least reference.

But the Statutory Court (R., 94) seems to have read into Section 761 a limitation contained in Section 50 of the Conservation Law. This was a misconception:

The first part of Section 50 (through subdivision 2 to which Judge Manton refers [R., 94]) reads as follows (Appendix, p. 22):

"The conservation department shall, for the purpose of carrying out the provisions of this article, have the following powers, duties and authority to be exercised through or by the division of lands and forests:

1. Have the care, custody and control of the several preserves, parks and other state lands described in this article.

2. Have the power to establish, acquire, control and manage other state parks and parkways in the forest preserve counties, and in the counties of Albany, Jefferson, Montgomery, Schenectady and Schoharie, and to acquire lands for such purposes when moneys have been appropriated therefor."

A later subdivision (30) of Section 50 makes it clear that Subdivision 1 is not intended to bring the Palisades Interstate Park within the Conservation Commissioner's "care, custody and control." That subdivision provides:

> "Nothing in this chapter shall be construed as extending the jurisdiction of the division of lands and forests over the real or personal property now or hereafter under the control or in the custody of the commissioners of the Palisades interstate park, but said division, subject to the powers of the commissioner, is authorized to cooperate with said commissioners of the Palisades interstate park by the joint employment of wardens, foresters and keepers, for the mutual protection of the lands under their respective jurisdiction and other state commissions and the preservation of the forests thereon and of the fish and game therein."

Nor does the Commissioner's power to establish and acquire land (subject to the limitation "when moneys have been appropriated therefor" [Subdivision 2, supra]) extend to the territorial limits within which the Palisades Interstate Park Commissioners have the right of eminent domain. Orange and Rockland Counties are not among the counties enumerated in Subdivision 2 nor are they among the Forest Preserve Counties of the Adirondack and Catskill regions.[1]

Whenever the New York Legislature has seen fit to impose upon a particular park commission any limitation in acquiring lands, it has done so in the particular statute relating to and defining the powers of that com-

[1]The Forest Preserve Counties are enumerated in Section 63 of the 1928 Conservation Law. For a statutory recognition of the difference between these counties and the Palisades Interstate Park region, see Appendix, p. 41.

mission. Each of these statutes was originally an independent act and has now, in the consolidated Conservation Law, become a separate part of Article XVI, which deals with the Division of Parks. Thus Part 9 of Article XVI is the Palisades Park Act, Part 11 the Long Island Park Act, etc.

The Legislature did not limit the power of entry and appropriation given to the Palisades Commission—the only interstate park commission—by any reference to moneys on hand or moneys appropriated.

The demonstration that the Statutory Court was wholly wrong in its attempt to read Section 50 into Section 761 concludes this argument. It should, however, be remarked that even if the Court had been right in its construction and if the Commissioners could be conceived to have violated Section 50, the circumstance could not give jurisdiction to the Statutory Court. It would merely mean that the Commission had violated a state statute,—not that the statute was void.[1] And it is only "upon the ground of the unconstitutionality" of the "statute" that jurisdiction can be taken under Section 266 of the Judicial Code.

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[1]Thus Pound, J., when he ruled that the first *Pauchogue* appropriation was void because of the absence of moneys on hand or appropriated to the Commission's use (supra, p. 32) defined the "question" as one "of statutory construction rather than one of constitutional law" (243 N. Y., at 26).

(6) The *Statutory Court entirely misconceived the legislation involved in Rockaway Pacific Corporation* vs. *Stotesbury, and therefore misconceived the decision rendered.*

Judge Manton cited *Rockaway Pacific Corporation* vs. *Stotesbury* (255 Fed., 345), for his ruling that "since money was not provided to pay an award, therefore the statute is in conflict with the Fourteenth Amendment" (R., 95).

An examination of the statute and facts involved in the *Rockaway Pacific* case will immediately show that that case furnishes no support at all for the decision below.

The statute involved was Chapter 13 of the New York Laws of 1917—"An Act to amend the state law, relative to the acquisition of land by the state for purposes of public defense." One of its provisions was:

> "The governor may, if requested by any officer or agent of the United States duly authorized under the hand and seal of any head of an executive department of the government of the United States, execute a deed or release to the government of the United States of the lands and the structures and waters thereon, described in the survey and map filed in the office of the secretary of state as hereinbefore provided. Such deed or release may be so executed at any time after the commission shall have entered upon and taken possession of such lands, structures and waters."

As appears from the title the purpose was to authorize the State to take land "for purposes of defense" in the then pending war with Germany and turn it over to the Government of the United States. It was therefore expected and intended that the property thus taken should

be paid for not by the state but by the federal government. The statute, therefore, did *not* pledge the credit of the state:

It gave the owner the right to sue in the New York Court of Claims,—"The court of claims shall have jurisdiction to determine the amount of such compensation, and upon proceedings being brought before such court as provided by law, an award shall be made of compensation for the lands, structures and waters so appropriated." But it omitted the promise that the owner's compensation for the property taken, as determined by the Court of Claims, shall be paid out of the state treasury.

The next section of the act emphasizes the deliberateness of this omission. The legislature *did* intend that the State should pay for "all searches necessary to prove the title," and so expressly provided that "the expense of making such searches shall be paid by the state treasurer out of funds appropriated therefor, on the warrant of the comptroller."

Obviously, the decision in the *Rockaway* case,—that a statute which intentionally omitted to pledge the state's credit is unconstitutional,—has no application to a case where that pledge is given in express and unmistakable language.[1]

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[1]The Pauchogue Land Corporation built a great deal of argument in all courts upon the *Rockaway Pacific* case, and in its *certiorari* application to this Court devoted the first point of its brief to that case alone.

The only mention of the *Rockaway* decision by any court in the *Pauchogue* litigation was the following clear statement of the distinction between the constitutional issue there and the issue in the *Pauchogue* case (and in the case at bar):

> "The case of *Rockaway Pacific Corporation* vs. *Stotesbury* (255 Fed., 345) has been urged by the respondent as an authority in support of its point that there must be a present or pre-existing legislative appropriation for the property taken. The case was decided by a divided court, but even if we accept the majority view, the statute there under review, as was stated by Circuit Judge Ward: 'goes no further in protection of the landowner than to provide the manner in which the amount of his compensation shall be ascer-

(*Footnote continued on next page.*)

(7) *The Statutory Court completely overlooked the fundamental presumption that the State will perform its obligations and pay its debts.*

The Statutory Court seemed to think that Section 59 gave no assurance of payment because the award which the owner can recover in the Court of Claims cannot be enforced against the State by execution (R., 96). It attempted to distinguish *Joslin Co.* vs. *Providence* as a case where " 'the owner under the statute may have execution issued against the city' " (R., 97).

Of course appellees cannot have execution against the State of New York any more than the plaintiff in *Crozier* vs. *Krupp* could have had execution against the United States. But this means of enforcing a judgment is not needed where the debtor is the sovereign. This Court in *Joslin Co.* vs. *Providence* said in so many words that the rule was the same in any case of "taking of property for public use by a State *or* one of its municipalities" (262 U. S., 668, 677; and see *Adirondack Railway* vs. *New York*, 176 U. S., at 350).

(*Footnote continued from p.* 44.)

tained.' The statute there criticised failed to express how the compensation, when ascertained, should be paid. There was no provision, as is here the case, requiring the Comptroller to draw his warrant on the Treasurer and commanding the latter officer to make payment. The most that the statute did was to permit the fixation of the amount of compensation. The method or means of payment was not stated. Therefore, the cited case and the one at bar are quite different in this most important respect."

Pauchogue Land Corporation vs. *Long Island State Park Commission*, 215 App. Div., 816, 824.

The quotation is from a dissenting opinion of Kapper, J., in the Appellate Division, with whom Kelly, P. J., concurred. The discussion was of the first entry and appropriation. The Court of Appeals, while disagreeing with these judges on a point of statutory construction present in the first *Pauchogue* appeal and not here present (*supra*, pp. 31-2) was in full accord with them on the constitutional question (*infra*, pp. 46-7).

That the Statutory Court *proposed* such a distinction, a distinction against the sovereign and in favor of a mere municipal subdivision, shows that it overlooked the underlying reason—the fundamental presumption—upon which the whole line of decisions of this Court rests. We mean the presumption that the sovereign will pay its debts and discharge its obligations (*Great Falls Mfg. Co.* vs. *Attorney General*, 124 U. S., 581, 597).

For particularly striking statements and applications of the principle see, besides the decisions of this Court analyzed in Point I, the following cases in the State Courts:

Talbot vs. *Hudson*, 82 Mass., 417, 431, 432 (cited as an authority on the general subject in *Sweet* vs. *Rechel*, 159 U. S., at 393);
Orr vs. *Quimby*, 54 N. H., 590;
Bridge Co. vs. *Union and Northumberland Counties*, 232 Pa., 255 (opinion by Moschzisker, J.);
St. Joseph & Grand Island Ry. Co. vs. *City of Hiawatha*, 95 Kan., 471;
Minnesota vs. *Messenger*, 27 Minn., 119.

The New York courts have *not* overlooked this presumption. Chancellor Kent did not overlook it when a century ago he rendered the great decision which settled the foundations of the subject.[1] Nor did the judges through whose courts the *Pauchogue* case so recently passed overlook the presumption. In the Appellate Division, Judge Kapper—with whom the Court of Appeals agreed upon the constitutional question—said (215 App. Div., at 824):

[1] *Rogers* vs. *Bradshaw*, 20 Johns., 735 (1823—cited by this Court in *West River Bridge Co.* vs. *Dix*, 47 U. S., 507, 542, and in *Sweet* vs. *Rechel*, 159 U. S., at 404); and see *supra*, p. 37 and *infra*, p. 74.

> "No instance has been called to our attention where the State of New York has refused to pay a judgment of the Court of Claims which it has authorized that court to render,"

and Judge Pound, writing for the Court of Appeals upon this constitutional question said, 243 N. Y., at 24:

> "We may assume that compensation need not be specifically provided by an appropriation of moneys therefor before the property is appropriated. The faith of the State may be ample security if it opens the door to the claimant to obtain the obligation of the State to pay. *It may be assumed that it will faithfully meet its obligations thus established.*"[1] (Our italics.)

Every reason the Statutory Court found for assuming jurisdiction thus turns out upon analysis to be only an additional argument against the jurisdiction.

The plain fact is that in every form readily imaginable this Court has by its long line of decisions, foreclosed the question appellees urged:

Where—as here—the appropriating body has been put in funds by the Legislature, where private bounty has supplied the funds for the public acquisition (*Pauchogue*

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[1]Court of Claims judgments have long been recognized as legal investments for savings banks in New York (N. Y. Banking Law, §239-a, subd. 1—N. Y. L., 1915, ch. 269 [amending L., 1914, ch. 369]; amended L., 1920, ch. 701), and for the Comptroller of the State in investing its trust funds (N. Y. County Law, §12, subd. 19—N. Y. L., 1905, ch. 244, amended L., 1909, ch. 16).

vs. *Long Island State Park Commission*), and where there were no funds on hand from any source (*Crozier* vs. *Krupp, Hays* vs. *Port of Seattle*);

Where—as here—the obligation of the sovereign is express and where that obligation arises by "implication" only (*Crozier* vs. *Krupp*);

Where—as here—it is the sovereign itself that appropriates and where the power is exercised by a municipal subdivision merely (*Williams* vs. *Parker*);

Where—as here—it is conceded by the bill that the State's highest officials, executive and legislative, have concurred in the appropriation and unite in maintaining its validity and where it is "agreed" that the condemning agency is "no party to the proceedings" and "is not estopped to deny liability" (*Williams* vs. *Parker*);

Where—as here—statutory authorization preceded the taking and where a later enactment was required to give a retroactive validity (*Crozier* vs. *Krupp*).

The Chief Judge of the State whose legislation was involved in the *Pauchogue* case and is involved in this case then made no mistake when he wrote the endorsement:

> "It does not appear that any substantial federal question is involved."

POINT III.

Appellees' objections to being compensated out of moneys authorized by the people in 1924, appropriated by the Legislature in 1926 and reappropriated in 1928, are without color of merit. It cannot be assumed that the New York Courts would sustain them and they cannot be made to serve as a basis for the jurisdiction of the Federal Courts.

Appellees do not allege that the use of moneys derived from the 1924 bond issue has been interfered with in any way by state courts or state officers. What appellees contend is that on their own construction of the 1924 Referendum Act, and their own interpretation of Article III, §21 of the state constitution the bond moneys are not available.

These constructions present questions of state law only, and the New York courts would have to rule upon these questions in accordance with appellees' contention before any impediment to appellees' full compensation, and consequently any due process question under the Fourteenth Amendment could—even on appellees' own theory—arise. And these constructions, as we shall see, are not even plausible constructions.

The present is therefore a typical case for the application of the rule which forbids the Federal Courts to assume jurisdiction upon a showing of hypothetical issues merely.

A.

Appellees' major objection (R., 7, 8) to being compensated out of the $3,500,000 appropriated in 1926[1] and reappropriated in 1928[2] is that the Referendum Act of 1924 and the Appropriation Act of 1926 both provided

[1] N. Y. L., 1926, ch. 16, see Appendix, p. 41.

[2] N. Y. L., 1928, ch. 75, see Appendix, p. 53.

that the land be acquired "under the provisions of chapter one hundred and seventy of the laws of nineteen hundred as amended"[1], whereas appellants propose to use it to pay for property taken by entry and appropriation,—a method the Commission was first empowered to use in 1928 when the revised Conservation Law repealed the Palisades Act of 1900 and re-enacted it with certain additions, including one giving the entry and appropriation power.

While Judge Manton sustained this objection (R., 91-92), it is demonstrably erroneous. It cannot be doubted that this reference to amendment in the Referendum Act—"the lands shall be acquired by the Commissioners of the Palisades Interstate Park under the provisions of chapter one hundred and seventy of the laws of nineteen hundred as amended"—was designed to include just such an enlargement of the Commission's authority as the revised Conservation Law of 1928 effected.

It has long been a rule of statutory construction in New York declared by the Legislature itself (General Construction Law, §80)[2] that "if any provision of a law be repealed and, in substance, re-enacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision." The reference in the Referendum Act of 1924 to the Palisades Park Act of 1900 must accordingly "be deemed" a reference to Part 9 of the 1928 Conservation Law,—the Law which consolidated the several park statutes and which at one and the same time repealed[3] and "in substance re-enacted"[4] Chapter 170 of the Laws of 1900.

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[1]See Appendix, pp. 38, 44-45.

[2]N. Y. L., 1909, ch. 27, §80, formerly L., 1892, ch. 677, §32. See Appendix, p. 54.

[3]See Appendix, p. 35.

[4]See Appendix, pp. 27, 35.

The rule which the General Construction Law of New York thus declares is the rule of the common law. As Mr. Justice Field put the matter (*Steamship Co.* vs. *Joliffe,* 2 Wall., 450, 458-9):

> "The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them. The observations of Mr. Chief Justice Shaw, in *Wright* vs. *Oakley* [5 Metc., 406], upon the construction of the Revised Statutes of Massachusetts, which in terms repealed the previous legislation of the State, may with propriety be applied to the case at bar.
>
> " 'In construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was never contemplated by the legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the reenactment of new ones.' "

The new Section 761[1] was none the less an amendment because its provisions effected not an alteration in the statute but an addition to the statute:

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[1]Appendix, p. 34.

> "*In addition* to the various methods of acquiring lands provided for in this part of this article, the commissioners of the Palisades interstate park shall have the power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law."

"An amendment may be *an addition to* as well as an enlargement of the sections of the statute existing at the time of such amendment" (*Bohmer* vs. *Haffen*, 35 App. Div., 381, at 386, aff'd 161 N. Y., 390—see 405-6). "The definitions of the word 'amendment' include *additions* to, as well as corrections of, matters already treated" (*Christian Feigenspan, Inc.*, vs. *Bodine*, 264 Fed., 186, at 190; aff'd 253 U. S., 350—see 352, 386).

To the same effect, see

> *State* vs. *Chadbourne*, 74 Me., 506, 508;
> *Commonwealth ex rel. Cummings* vs. *Attorney General*, 13 Pa. Dist., 521, 525.

With the propositions thus established beyond debate that the reference in the 1924 Bond Act to the original Palisades Park Act is to "be deemed" a reference to the Statute which repealed, re-enacted and in all respects replaced it, and that an addition is an amendment, there remains to be considered only whether the reference of the Referendum Act to "Chapter 170 of the Laws of 1900 as amended" meant to include only amendments made before the Referendum Act was passed,—and none that might thereafter be made.

Ordinary usage and familiar grammatical principles forbid such a construction. There is no future participle in English: the past participle has to do duty for the future. And the past participle does duty for the future in one of the commonest of legal phrases,—in a sale of securities "if, when and as delivered."

And decisions of the New York courts and the clearly shown usage of the New York Legislature likewise forbid the construction which excludes future amendments:

The Appellate Division, in an opinion by Judge Miller, construed "rules established as aforesaid" as "obviously referring," among other things, to rules *"to be established"* (*People ex rel. Garvey* vs. *Prendergast*, 148 App. Div., 129, 132—our italics).

The Court of Appeals declared the phrase "except such as are by special laws for that purpose expressly allowed," in Section 55 of the Revised Statutes, prohibiting the racing of animals, not to be "limited to the time of the adoption of those statutes" but to have also *"a prospective effect"* and to "except such trotting as has been allowed by special laws then existing *or passed since that time"* (*Harris* vs. *White*, 81 N. Y., 532, 545—our italics).

And the very revision which appellees say was not within the meaning of the phrase because the phrase refers to past amendments only, completely refutes that construction. The 1928 Conservation Law itself contains the phrase "as amended" in a context where the reference must be to future amendments. Section 674 of the 1928 Conservation Law provides that the "eighth park region shall be governed by the provisions of Section 748 of this chapter as amended." Now Section 748 was a new section written into the Conservation Law when Section 674 was adopted. Any reference to the amendment of Section 748 must therefore be to amendment in the future.

Indeed, the construction which includes future amendments within the "as amended" reference is the only construction which gives any meaning to the phrase. For a reference to Chapter 170 of the Laws of 1900—*without the words "as amended"*—would upon established prin-

ciples of statutory construction, have meant Chapter 170 of the Laws of 1900 with all amendments and additions thereto that had been made up to the time the Referendum Law was passed.

Panama R. R. Co. vs. *Johnson*, 264 U. S., 375, 391-2;
Board of Excise vs. *Curley*, 9 Abb. N. C., 100 (Ct. of Appeals), 69 N. Y., 608;
Mundy vs. *Excise Commissioners*, 9 Abb. N. C., 117, 120;
Steele vs. *Village of River Forest*, 141 Ill., 302, 306.

The construction of "as amended," which appellees proposed and the Court below adopted thus makes the phrase superfluous and meaningless.[1]

B.

The attempt to find fault with the reappropriation of 1928[2] is trivial and futile. The objection taken is based on the provision of Article III, Section 21 of the New York Constitution that "every law,"

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[1]The Statutory Court gave no authority for its construction of "as amended." Judge Manton fell back—citing a decision of a single judge of the New York Supreme Court at Trial Term—on the general assertion that the "basic requirements" of referendum laws cannot be changed by later legislative enactments (R., 93). We have shown that the only tenable construction of the Referendum Act itself and of the "as amended" phrase in that Act, is one which makes it unnecessary to debate that question. But it has been expressly decided in New York that subsequent Legislatures may modify the details of the general project (*Kibbee* vs. *Lyons*, 202 App. Div., 562, 566; aff'd 235 N. Y., 546; *People ex rel. Jordan* vs. *Wotherspoon*, 94 Misc., 419, aff'd 176 App. Div., 947). For it is the general project, not the details and mechanics of execution, upon which the people vote. (See *e. g.* the question framed for the people in the 1924 Referendum Act, infra, p. 55.)

[2]N. Y. L., 1928, ch. 75, part 5; Appendix, p. 53.

> "making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum."

The sole objection appellees take (R., 8) and, of course, the only objection the Court below took (R., 93-4) is that there is a failure "to specify the object to which the sum appropriated is to be applied." The object is stated in the reappropriating statute as "the *State Park System* Fund."[1] And that is the way the object of the Referendum Act was designated in that Act itself. The proposition submitted to the People was[2]:

> "Shall chapter (here insert the number of the chapter) of the laws of nineteen hundred and twenty-four, entitled 'An act making provision for issuing bonds to the amount of not to exceed fifteen million dollars for the extension and improvement of existing state parks and the establishment of new state parks and parkways in order to create a comprehensive and unified *state park system* for the promotion of the recreation, instruction and health of the people, and providing for a submission of the same to the people to be voted upon at the general election to be held in the year nineteen hundred and twenty-four.' be approved?"

Now a referendum act is subject to the identical requirement, or rather a more stringent requirement,—that it "*distinctly* specify" its "single object" (New York Constitution, Article VII, Section 4). If appellees were right in their view that the specification of the object in the Reappropriation Act of 1928 is insufficient, it must

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[1]Appendix, p. 53.

[2]Appendix, p. 40.

follow that the Referendum Act was void. But everybody agrees — the Governor and the Attorney General; the Chairmen of the financial committees of the Legislature and the Legislature as a whole; the Court of Appeals (*Pauchogue Land Corp.* vs. *Long Island State Park Commission*, 243 N. Y., at 25); appellees themselves (R., 7)—that the Referendum Act was in all respects valid.[1]

Judge Manton was then wholly wrong in holding that there was the least imperfection in the reappropriation of 1928. But appellees' point would have been futile even if the objection to the reappropriation had been well founded. For the question is as to the availability of funds. The funds would have remained available if there had been *no* reappropriation. For the funds were funds which the people of the state had voted, in accordance with Article VII, Section 4 of the New York Constitution. And that section, after prescribing the procedure necessary for the creation of state debts by the Legislature, further provides that

> "The money arising from any loan creating such debt or liability *shall be applied to the work or object specified in the act authorizing such debt or liability or for the payment of such debt or liability, and for no other purpose whatever.*"[2]

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[1]A common practice of the New York Legislature is to do what in this case was done,—to make an original appropriation, item by item and at the end of two years to reappropriate the whole of the unexpended balance.

The item in the appropriation act of 1928 (Appendix, p. 53) just before the "State Park System Fund" item and just after the "Palisades Interstate Park Fund" item, supplies a perfect illustration. That item is the "State Institutions Buildings Fund" reappropriation of $11,956,420.08. The act of *original appropriation* (L., 1926, Ch. 769) had divided the buildings fund among 16 different institutions. But the *reappropriation* was simply of the total unitemized, unexpected balance.

[2]Appendix, p. 6.

Consequently all money derived from the bond issue of 1924 as soon as it came into the State Treasury became a part of the State Park System Fund, and it could not be diverted by the legislature to any other purpose or object, whether subsequent reappropriations were in proper form or not.

For a good statement that the proceeds of state bonds authorized by a referendum after once being appropriated by the Legislature can never be diverted to any other purpose, see *State* vs. *Dixon*, 59 Mont., 58.

The two contentions we have refuted underly appellees' whole case. In the language of appellees' own brief in the court below (p. 19), "save for Article I, Section 6 [the New York due process clause] the provisions of the state constitution hereinafter invoked, occupy in this case the position of facts in the chain of causation which bring the Fourteenth Amendment into operation."

These preliminary questions of state law which must be ruled in appellees' favor before there could arise even the unsubstantial Federal question urged are so obviously without merit, that it cannot be assumed the New York courts would sustain appellees' contentions.

And even if the questions under the State Constitution and statutes were difficult, as in fact we have seen them to be simple, there would still be no basis for jurisdiction. For the Federal Courts cannot lay the basis for their own jurisdiction by deciding preliminary questions of state law—which have not yet come before the state courts (compare *Gilchrist* vs. *Interborough Co.*, 279 U. S., 159, 207)—in such a way as to present a federal question (*New Orleans* vs. *Benjamin*, 153 U. S., 411; for a particularly good statement, see *Levy* vs. *City of Shreveport*, 28 Fed., 209, 214, and compare cases *infra*, p. 65).

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POINT IV.

Appellees are not injured by having their compensation paid out of funds derived from the bond issue of 1924. They are therefore without standing to raise the questions of New York law on which they predicate their so-called Federal question.

Appellees, who have sought and obtained from the Federal Court an adjudication that the reappropriation of the State Park System fund in 1928 was invalid (R., 94), and that the use of moneys derived therefrom to pay them for their property would be contrary to the provisions of the Bond Issue Act and to Article VII, Section 4 of the State Constitution (R., 82, 93) are without standing to raise this point:

Appellees would suffer no injury, and consequently their rights could suffer no infringement, by having their compensation paid out of the bond issue moneys. Only those who are injured by the enforcement of a statute can successfully attack its constitutionality (*Southern Railway Co.* vs. *King*, 217 U. S., at 534).[1] "One who would strike down a state statute as violative of the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional" (*Plymouth Coal Co.* vs. *Pa.*, 232 U. S., 531, 544).

One to whom payment is to be made pursuant to statute cannot be heard to say that the statute *deprives* him of property without due process of law.

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[1]Among many applications of the principle see

Hatch vs. *Reardon*, 204 U. S., 152, 160;
Stearns vs. *Wood*, 236 U. S., 75, 78;
Texas vs. *Interstate Commerce Comm'n*, 258 U. S., 158, 162;
Willing vs. *Chicago Auditorium*, 277 U. S., 274, 288, 289-90;
United Gas Co. vs. *R. R. Commission*, 278 U. S., at 310;
Williams vs. *Riley*, 50 Sup. Ct. Rep., 63, decided Nov. 25, 1929.

That the rule in New York is the same, see

Schieffelin vs. *Komfort*, 212 N. Y., 520, 533 and cases cited;
Lange's Creamery, Inc., vs. *City of Niagara Falls*, 251 N. Y., 343 (1929).

POINT V.

The bill of complaint does not even allege the facts necessary to present the unsubstantial question of due process upon which jurisdiction was invoked. It fails to show that the funds available for appellees' compensation at the time of the entry and appropriation were even upon appellees' own theory inadequate. Nor does it show any obstacle to the use of moneys derived from the bond issue of 1924 other than appellees' own objections.

The jurisdiction of the Federal Courts cannot be based upon a question purely hypothetical.

The facts essential to the presentation of the Federal question upon which it is sought to invoke the jurisdiction of the Federal Court must appear by the allegations of the bill of complaint (*Western Union Tel. Co.* vs. *Ann Arbor R. R. Co.*, 178 U. S., 239, 243-4; *Arkansas* vs. *Kansas & Texas Coal Co., etc.*, 183 U. S., 185, 188-9; *Louisville & Nashville R. R. Co.* vs. *Mottley*, 211 U. S., 149, 152; *Chappell* vs. *Waterworth*, 155 U. S., 102, 108). And these facts must be alleged "according to the rules of good pleading" (*Hull* vs. *Burr*, 234 U. S., 712, 720; *Southern Ry. Co.* vs. *King*, 217 U. S., 524, 536; *Arbuckle* vs. *Blackburn*, 191 U. S., 405, 413), not by mere inference (*Hanford* vs. *Davies*, 163 U. S., 273, 279-80, or by the statement of legal conclusions (*Gold-Washing & Water Co.* vs. *Keyes*, 96 U. S., 199, at 202, 203).

The supposed absence of an antecedent appropriation in an amount reasonably sufficient to pay for plaintiffs' property is the sole premise of the due process question appellees sought to raise, and upon which the District Court assumed jurisdiction.

But the existence of this premise is not shown by the allegations of the bill. It is not shown what just com-

pensation will amount to, it is not shown what appropriations the Commission had on hand or what resources:

1. *The bill of complaint fails to show what just compensation will amount to, or that it will exceed* $500,000.

(a) The bill contains a *general allegation* that the real property *and* the leasehold are "of the value at present in excess of $3,000,000" (R., 8).

But the existence of the leasehold cannot increase the total amount recoverable; it can affect only the apportionment of a Court of Claims judgment between owner and lessee. (Lewis, *Eminent Domain* [3d ed.], p. 1253; *Matter of William and Anthony Streets,* 19 Wend., 678.)

(b) The *specific references* of the bill are to appellees' capitalization (R., 9), to the deposit of trap rock and the plans to develop the property as a quarry (R., 4, 5), and to the lease and other agreements supplemental thereto (R., 5, 19-30) in which an annual royalty based on the capacity of the contemplated plant takes the place of an agreed rental (R., 12, 13, 23-8).

"Limiting the general statement by the specific, in accordance with the context" (*Merritt & Chapman Co.* vs. *U. S.,* 274 U. S., 611, 612), we must accordingly take the $3,000,000 figure as including the estimated future profits and value of the quarry in operation.[1] But the future profits even of a going concern cannot, unless the statute so declares, be included as an element of just compensation.

Banner Milling Co. vs. *State,* 240 N. Y., 533, c. d., 269 U. S., 582;
Joslin Co. vs. *Providence,* 262 U. S., 668, 675;
Mitchell vs. *U. S.,* 267 U. S., 341.

[1]This construction is confirmed by appellees' affidavits (R., 36-7, 43, 44, 46, 48-9, 50-1, 53; see p. 15, supra).

Still less can the profits or value of a business not yet in operation be recovered.

> *N. Y. Central R. Co.* vs. *Maloney,* 234 N. Y., 208, 217;
> *Orleans County Quarry Co.* vs. *State,* 172 App. Div., 863, 865-6[1].

(c) Other specific allegations of the bill are as to the value of *personal* property and the amount of commitments for personal property (R., 6-7).

But the appropriation papers attached to the bill show (R., 34-5; compare 63, 64-75) that the State appropriated only the *real* property and is, therefore, not liable for any personal property nor for the depreciation in value of personal property (*People* vs. *Johnson & Co.,* 219 App. Div., 285; aff'd 245 N. Y., 627; c. d., 275 U. S., 571).

(d) And the bill does not even allege the value of the personal property actually on the premises at the time

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[1]This opinion exposes the very fallacy into which appellees have fallen —of estimating the value of "the land appropriated by figuring the probable amount of stone in the ground and giving the claim that value" (compare R., 36, 46, 53). In reversing an award of the Board of Claims rendered upon that basis Judge John M. Kellogg said:

> "There is no limit to the value of a quarry, or sand bank, or clay bank, if an estimate can be made of the amount of stone, sand or clay which can be taken and a fixed price put upon it. Such computation ignores to quite an extent the loss and contingencies of the business. The Board should properly take into consideration the nature of the property, that it is in a locality where there are valuable quarries, and that there are quarries upon it, and that it has a value greater than farming lands, and should give consideration to the evidence as to the quality and quantity of the stone which may be quarried, but the fact remains that there are many quarry lands in the locality, and such lands have only been sold by the acre, and if all the quarry land in Orleans county can be sold by fixing the value of the stone *in situ*, the wealth of the county is beyond reasonable estimation."

of the entry and appropriation (R., 5-6). Nor does it allege that no personal property has been removed by appellees (R., 7). (The significance of the omission appears by the affidavit of appellant White, showing that after the service of the notice of entry and appropriation "certain movable property and equipment" was "removed from the premises" [R., 62].)

The bill thus shows on its face that appellees cannot recover $3,000,000 in the Court of Claims, and utterly fails to show what they can recover.

2. *It is admitted that* $3,500,000 *was appropriated in* 1926, *and it is not alleged that any part of this appropriated fund had been expended before appellees' property was taken.*

It stands admitted on the face of the bill that in 1926 the New York Legislature had put $3,500,000 at the disposal of the Palisades Interstate Park Commission, and that about two weeks before the adoption of the revised Conservation Law of 1928,[1] under which the entry and appropriation was made, the New York Legislature "purported to reappropriate the said sum" (R., 8).

The bill of complaint does not allege that any part of the $3,500,000 had been expended before the entry and appropriation.

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[1]The 1928 reappropriation law (N. Y. L., 1928, ch. 75, part 5) became effective February 17, 1928 (see Appendix, p. 53).

The revised Conservation Law (N. Y. L., 1928, ch. 242 became effective March 5, 1928 (see p. 3, *supra*).

The entry and appropriation took place on October 11, 1928 (R., 7).

3. *The bill of complaint alleges that* $500,000 *out of the* $3,500,000 *appropriation was allocated to the acquisition of appellees' property before the property was taken.*

This alleged allocation (R., 6) is not shown by the bill to be insufficient, because (as we have seen) the value of the property is not shown.

And we know that the allocation in no way limited the obligation of the State or the pledge of its credit. It was merely a tentative preliminary estimate on the part of the executive and financial officers, whose duty it was to pass on the project, of the probable cost to the State.

4. *The bill of complaint does not show that any doubt has ever been raised, except by appellees themselves, as to the legality of using the* 1924 *bond issue money to pay for appellees' land or as to the validity of the reappropriation act of* 1928 *or of the allocation.*

Appellees' claim that the allocation of moneys derived from the bond issue of 1924 was illegal (R., 7, 9), and their further claim that the 1928 reappropriation for the use of the Palisades Interstate Park was invalid (R., 8, 9), are not put upon any ruling of the New York Court of Claims or of any New York court or of any administrative or executive officer of the State.

What the bill shows, on the contrary, is that the Governor of New York, the State Council of Parks, the Conservation Commissioner, and the Chairmen of the two financial committees of the Legislature all concurred with the Palisades Interstate Park Commission in treating the bond issue moneys as validly appropriated, and available to pay for the land taken by entry and appropriation. And the bill of complaint further shows that the Attorney General—the chief law officer of the State who alone could raise the question (compare Cullen, C. J., in *County*

of Albany vs. *Hooker*, 204 N. Y., 1, 19)—joins with all the other appellants in asserting the validity of the entry and appropriation. He appears in opposition to the suit, is joined as a defendant and is enjoined by the decree.

5. *It is not alleged that no funds were available outside of moneys derived from the bond issue of* 1924.

It is not alleged that the state park system fund derived from the bond issue of 1924 is the only source from which funds had been appropriated for the use of the Palisades Interstate Park Commission before appellees' land was appropriated.

Nor is it alleged that the so-called $500,000 allocation —shown by an exhibit to the bill to be in reality a $600,000 allocation (R., 34-5)—was the only fund the Commission had on hand.

Here again the significance of the omissions appears from the affidavits in opposition. For, as we have seen, these affidavits show that on October 11, 1928, the commission had other moneys, securities and property on hand amounting to more than $500,000, all of which "could be lawfully used for the acquisition of lands for park purposes in any manner" (R., 79).

The Federal question upon which jurisdiction was asked and assumed is thus not actual and present,—merely hypothetical.

Neither the absence of an appropriation adequate to pay for the property, nor any lack of funds whatsoever is shown by the allegations of the bill. The utmost that appears is that *if* the reappropriation of 1928 and the use of the bond issue moneys were to be attacked and the attack sustained by the New York courts, *then* (if it

can be further assumed—without being alleged and contrary to the fact—that no other funds were available), in that future and conjectural event there *might* arise some question of inadequacy of funds.

On no such showing can jurisdiction be based. "The judicial power extends to all cases in law and equity arising under the Constitution, *but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis*" (Fuller, C. J., in *New Orleans* vs. *Benjamin*, 153 U. S., 411, 424—our italics).

To the same effect are

Shreveport vs. *Cole*, 129 U. S., 36, 42;
Defiance Water Co. vs. *Defiance*, 191 U. S., 184, 193, 194;
Levy vs. *City of Shreveport*, 28 Fed., 209, 214;
McCain vs. *Des Moines*, 174 U. S., 168, 176-7, 181.

Chief Justice Fuller, in the *Benjamin* case, referring to allegations of the bill in principle exactly like the allegations here, said (p. 430):

> "Jurisdiction could not be obtained upon the bare averment of an anticipation that the city might rely on the repealing act as wiping out apportionments, tax levies and tax collections, and that the state courts would so decide. And the bill made no such specific averment, with which, indeed, many of its allegations were wholly inconsistent."

POINT VI.

Injunction is not the remedy to recover the possession of real property. It follows that the bill is without equity and the case therefore beyond the jurisdiction of the Statutory Court, and further that the case is outside the jurisdiction of the Federal Courts altogether. For a plaintiff's case in ejectment can present no federal question.

A.

Appellees were out of possession when they brought their suit, and had been for five months, as their bill of complaint admits (R., 7, see also 43).

They asked in their bill that the officers of the State be restrained from "in any way enforcing or attempting to enforce" the provisions of Part 9 of the 1928 Conservation Law and the notice of entry and appropriation served thereunder (R., 10, 9). But there was no enforcement of the act or of the notice *in prospect* when appellees brought their suit. Possession had been taken when the notice of entry and appropriation was served (R., 7).

The only *prospective* relief appellees asked was that appellants be enjoined "from *continuing* in possession of plaintiffs' said property" (R., 10),—in other words that appellees themselves be *restored* to possession by injunction.

The relief asked under the guise of an equity bill and prayer for injunction is thus nothing more or less than the relief a judgment in ejectment would give. The equity jurisdiction of the federal courts does not extend to such a case.

United States vs. *Wilson*, 118 U. S., 86;
Whitehead vs. *Shattuck*, 138 U. S., 146;
Lacassagne vs. *Chapuis*, 144 U. S., 119;
Black vs. *Jackson*, 177 U. S., 349, 361, 363;
Boston, etc., Mining Co. vs. *Montana Ore Co.*, 188 U. S., 632;

Denison vs. *Keck*, 13 Fed. (2d), 384 (C. C. A., VIII);
Johnston vs. *Corson Gold Mining Co.*, 157 Fed., 145 (C. C. A., IX).

Whitehead vs. *Shattuck* is the leading authority. Plaintiff claimed a title in fee; he brought suit alleging that defendants were in possession and demanding a cancellation of the documents under which defendants claimed, as a cloud upon his title. This Court affirmed a judgment dismissing the bill. Mr. Justice Field said (138 U. S., at 151):

> "Where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

In *Lacassagne* vs. *Chapuis* a bill for injunctive relief was dismissed because the basic demand was the precise demand in reality made here,—that plaintiff be restored to possession. Mr. Justice Blatchford said (144 U. S., at 124):

> "The plaintiff was out of possession when he instituted this suit; and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to *restore* the plaintiff, by injunction, to rights of which he *had been* deprived. The function of an

> injunction is to afford *preventive* relief, not to redress alleged wrongs which have been committed already. *An injunction will not be used to take property out of the possession of one party and put it into that of another.*" (Our italics.)

Nothing is pleaded to take the case out of the rule. Inadequacy of legal remedy is the test of equity jurisdiction,—"the only test of jurisdiction" in the Federal courts (*Payne* vs. *Hook*, 7 Wall., 425, 430; *McConihay* vs. *Wright*, 121 U. S., 201, 206; *Indiana Mfg. Co.* vs. *Koehne*, 188 U. S., 681, 690) and the test applied in this class of cases (*Lancaster* vs. *Kathleen Oil Co.*, 241 U. S., 551, 555)—and there is nothing in the bill to show that the legal remedy of ejectment is inadequate. The only "irreparable" damage alleged is said to be caused by appellants' "continued unlawful occupation" and by "impossibility of operation" (R., 8). There is nothing alleged that even suggests that the officials of the State of New York, who are the defendants, would dispute title and right to possession in the face of a judgment against them in ejectment.[1]

B.

That the bill shows no ground of *equity* jurisdiction is fatal to the jurisdiction of the Statutory Court,—to the jurisdiction of any federal court of *equity*. That the suit in reality is in ejectment defeats the jurisdiction of the Federal Court even on the *law* side. For an ejectment action is not one arising "under the Constitution

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[1]Judge Manton said that the action is not "one for ejectment" (R., 96) and cited

Hopkins vs. *Clemson College*, 221 U. S., 636;
U. S. Freehold Land Co. vs. *Gallegos*, 89 Fed., 769.

Both of these were cases of continuing interference with the water rights of owners who remained in possession, and held merely that injunction would lie to restrain the continuing trespass.

or the laws of the United States," and in the absence of diversity of citizenship an ejectment action will not lie in the Federal Courts.

> *Taylor* vs. *Anderson*, 234 U. S., 74;
> *Deere* vs. *State of New York*, 22 Fed. (2d), 851 (D. C., N. D., N. Y.);
> *Florida Central, etc., R. R. Co.* vs. *Bell*, 176 U. S., 321, 325;
> *Joy* vs. *City of St. Louis*, 201 U. S., 332, 340.

"It is the settled interpretation of these words," as used in the jurisdictional statute,

> "that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." (*Louisville & Nashville R. R.* vs. *Mottley*, 211 U. S., 149, at 152.)

Taylor vs. *Anderson* and *Deere* vs. *State* are exactly in point. Those were ejectment cases, and the ruling was that the federal court was without jurisdiction although the plaintiff in each case alleged—anticipating a defense—that defendant's claim of title was defeated by a federal enactment.

The jurisdictional test is indeed even stricter than that supplied by the statement quoted and the illustrations

given. It is not only in the plaintiff's statement of his own case, it is in his statement of the facts *essential* to his case, that the Federal question which will support jurisdiction must be found. And since in an ejectment action it is not incumbent upon the plaintiff to state the source of his title, he cannot, even by pleading that the Federal Government was the source, give jurisdiction to the Federal courts,—as this Court flatly decided in *Florida Central R. R.* vs. *Bell* and *Joy* vs. *City of St. Louis*. In the *Joy* case Mr. Justice Peckham said (201 U. S., 332, 340):

> "The general rule in such actions, as to the complaint, is that the only facts necessary to be stated therein are, that plaintiff is the owner of the premises described, and entitled to the possession, and that defendant wrongfully withholds such possession, to plaintiff's damage in an amount stated. Setting out the source of the plaintiff's title, as was done with so much detail in this case, was unnecessary, but it does not alter the case, because a claim that the title comes from the United States does not, for that reason merely, raise a Federal question."

Why, in the face of all these clear objections to the federal jurisdiction, did appellees bring this case into the Federal Courts? Solely because the decisions of the appellate courts of New York so recently rendered in the *Pauchogue* and *Flagg* cases made manifest the hopelessness of litigation in those courts. But one cannot claim the jurisdiction of the Federal Courts for the sole reason that he must lose upon state issues in the state courts.

POINT VII.

The considerations already advanced show that the bill is, on its face, without merit and should on that ground too have been dismissed.

The considerations we have developed in their jurisdictional aspect—that the federal question urged has been foreclosed by repeated decisions of this Court; that appellees' contentions upon the preliminary questions of state law are groundless and appellees without standing to urge these contentions; that the bill of complaint merely simulates an equity suit for injunctive relief, asking nothing, and showing the need of nothing, that ejectment would not give—are all equally conclusive against the merits.

And these objections to the merits of the bill are all open here. This Court's power of review, as Mr. Justice Van Devanter said in *Denver* vs. *New York Trust Co.* (229 U. S., 123, 136):

> "is not confined to the act of granting the injunctions, but extends as well to determining whether there is *any insuperable objection,* in point of jurisdiction *or merits,* to the maintenance of either bill, and, if so, to directing a final decree dismissing it. *Smith* vs. *Vulcan Iron Works,* 165 U. S., 518, 525; *Mast, Foos & Co.* vs. *Stover Manufacturing Co.,* 177 U. S., 485, 494; *Harriman* vs. *Northern Securities Co.,* 197 U. S., 244, 287; *United States Fidelity & Guaranty Co.* vs. *Bray,* 225 U. S., 205, 214." (Our italics.)

POINT VIII.

The decisions of a century certify the sufficiency of Conservation Law, Section 59 under the due process and just compensation clause of the New York Constitution, and the Statutory Court manifestly erred in holding to the contrary.

The decree actually adjudges Section 59 to be in violation of the *New York* due process and just compensation clause—Article I, Section 6 (R., 82). Leading New York cases show the completeness of this error.

The *Adirondack Railway* litigation involved, as we know, a provision of the Adirondack Park Act, indistinguishable from Section 59, and upon which Section 59 was based. We have seen what this Court said about the assurance of just compensation which the Adirondack legislation gave. This is what Judge Vann of the Court of Appeals said (*People* vs. *Adirondack Ry. Co.*, 160 N. Y., 225, at 241):

> "All the canals of the state were built under these acts, and much property of great value was appropriated solely under their provisions. For many years the powers thus conferred were in constant exercise, and although these statutes were often before the courts, not one was ever declared unconstitutional because of the summary method authorized in appropriating property. There was neither hearing nor notice, for the canal commissioners, or their agents, simply took possession of and used 'all lands, streams and waters' which they deemed necessary for the use of the canals. This completed the condemnation, except that the damages when ascertained were paid by the state. Under some of the acts, if the property owners filed their claims within one year after the appropriation, they re-

ceived the amount awarded by the appraisers, and unless they filed their claims within the period mentioned they received nothing in the absence of special legislation. Adjudications made many years ago, and acquiesced in ever since, sustained, some directly and others indirectly, the constitutionality of this legislation, and without further discussion we hold that the statute under consideration is not unconstitutional because it does not provide for condemnation by due process of law. (*Wheelock* vs. *Young*, 4 Wend., 647; *Jerome* vs. *Ross*, 7 Johns. Ch., 315; *Rogers* vs. *Bradshaw*, 20 Johns., 735.)"

Judge Manton actually cited the first *Pauchogue* decision—of the second he made no mention—as *supporting* his conclusions (R., 95, 96). This is what Judge Pound, writing for the unanimous Court of Appeals, said of the constitutional question in the first *Pauchogue* decision (243 N. Y., at 24):

"The power of the State to appropriate private property for public use can be held subject to no further limitation than that the statute under which the property is taken shall recognize on the taking of the property the absolute right of the owner to just compensation and make provision for the prompt determination and payment of such compensation from the public funds. (*Kahlen* vs. *New York*, 223 N. Y., 383, 389.) We may assume that compensation need not be specifically provided by an appropriation of moneys therefor before the property is appropriated. The faith of the State may be ample security if it opens the door to the claimant to obtain the obligation of the State to pay. It may be assumed that it will faithfully meet its obligations thus established. A judgment of the

> Court of Claims assessing damages on which the Comptroller shall issue his warrant for payment of the amount due the claimant with interest to be paid by the Treasurer may sufficiently guarantee the constitutional right to just compensation. Otherwise, the State might not be able to act in an emergency to take property for purposes of public defense or health or other great public needs. No needless limitations should be placed on the power of the State."

Of the long line of New York decisions in accord, we may mention

> *Matter of Mayor*, 99 N. Y., 569 (cited for "the rule in New York" by this Court in *Adirondack Ry. Co.* vs. *N. Y.*, 176 U. S., 349-350);
>
> *Kahlen* vs. *State of New York*, 223 N. Y., 383 (opinion by Pound, J., citing at 389 *Sweet* vs. *Rechel* and *Crozier* vs. *Krupp*, and itself cited in 243 N. Y., at 24, supra);
>
> *Rogers* vs. *Bradshaw*, 20 Johns., 735, 744-45 (opinion by Kent, C., in 1823, cited by this Court in *West River Bridge Co.* vs. *Dix*, 47 U. S., 507, 542, and *Sweet* vs. *Rechel*, 159 U. S., at 406);
>
> *Jerome* vs. *Ross*, 7 Johns. Ch., 315 (Kent, C.).

As it is thus wholly clear that the Statutory Court misconceived the rule of due process and just compensation settled for a century in the New York Courts, we may pass rapidly over particular errors. It should, however, be noted that it is on the authority of *Sage* vs. *City of Brooklyn* (89 N. Y., 189) that the Statutory Court declared that Subdivision 7 of Section 59—the subdivision carrying the *express* promise of the State —"adds nothing by way of a pledge of faith and credit"

(R., 97). Chief Judge Andrews, in the *Sage* case, said just the opposite (p. 196):

> "The pledge of the faith and credit of the State, or of one of its political divisions, for the payment of the property owner, accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment, has been held to be a certain and sufficient remedy within the law."

Of *Newell* vs. *People* (7 N. Y., 9) the only other New York authority to which the Statutory Court made allusion (R., 96), it is sufficient to say that the case involved no question of due process and is absolutely irrelevant to any issue in this litigation.

POINT IX.

The interlocutory decree is not confined to preserving the status quo. It gives appellees all the relief that a final decree in their favor could give.

We have shown that the District Court assumed jurisdiction upon a Federal question that was put at rest many years ago, and upon premises of state law that are groundless and hypothetical, and we have shown that it entertained as a bill in equity a pleading that has nothing of equity about it except the phraseology of the prayer for relief. Having thus erroneously assumed jurisdiction and taken equitable cognizance of the case, the court below then granted the decree from which this appeal is taken, a decree purporting to grant *interlocutory* relief, but in reality giving appellees what a *final* decree in their favor would give—possession and unrestrained control of the property.

The Statutory Court imposed no check upon the exercise of appellees' dominion over the property pending the final determination and thus put it within their power to ruin it for park purposes. Observe the sweeping language of the so-called interlocutory decree:

Defendants are enjoined not only "from continuing in possession of plaintiffs' said property" (R., 83), but even (R., 86) "from doing any acts or things as aforesaid which may in any respect interfere with the ownership or possession of the plaintiffs of the aforesaid property or their free use and enjoyment thereof."[1]

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[1]The practice in the Southern District of New York is for a decree granting an interlocutory injunction to be settled upon notice pursuant to Southern District Rule xxx.

The decree was settled without notice. Pointing out the error, defendants below in briefs and oral argument before the Presiding Judge, urged a modification of the decree. But the Statutory Court declined to change it in any particular.

"The sole object of an interlocutory injunction is to preserve the subject under controversy in its then condition, and without determining any question of right, merely to prevent the further perpetration of wrong or the doing of any wrong whereby the right under controversy may be materially injured or endangered" (I High, *Injunctions* [4 ed.], Section 4). And such is the rule of this Court (*Lawrence* vs. *St. Louis-San Francisco Ry. Co.*, 274 U. S., 588, 594; *Erhardt* vs. *Boaro*, 113 U. S., 527). It follows that an interlocutory injunction

> "cannot be used for the purpose of taking property out of the possession of one party and putting it into the possession of another, nor does it go to the extent of ordering defendant to undo what he has already done, since it might thereby be productive of as much injury to defendant as that of which the party aggrieved complains. The jurisdiction, therefore, being exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done, on an interlocutory application for an injunction courts of equity will only act prospectively, and will interpose only such restraint as may suffice to stop the mischief complained of and preserve matters *in statu quo.*" (High, *Injunctions*, ibid.)

"A rule of law cautions us to proceed with great deliberation where the injunction *pendente lite* will in effect determine the litigation, and give the party seeking the relief the entire relief which is prayed for in the decree," said Judge Manton, writing for the Court of Appeals for the Second Circuit in *American Mercury* vs. *Kiely* (19 Fed. [2d], 295, 297) and citing abundant authority. This "rule of law" his opinion in this case overlooks.

An interlocutory decree that "will permit one party to obtain any advantage by acting, while the hands of the adverse party are tied by the writ," is "an abuse of judicial discretion" (*Spring Valley Water Co.* vs. *City & County of San Francisco*, 165 Fed., 667, 709).

> *In re Arkansas R. R. Rates*, 168 Fed., 720, 723;
> *Lawrence* vs. *St. Louis-San Francisco Ry. Co.*, *supra;*
> *Ramapo Mts. Water, Power & Service Co.* vs. *Commissioners of Palisades Interstate Park*, 177 App. Div., 700, 705.

The error of granting such an interlocutory injunction is gravest where, as here, it is the right and interest of the public that is imperiled. In the recent case of *Lawrence* vs. *St. Louis-San Francisco Ry. Co.* this Court reversed an interlocutory decree which, by failing to preserve the *status quo* pending the hearing of the merits, "exposed the city and its citizens to danger of irreparable loss" (274 U. S., at 594).

And gravest of all is the error of granting final relief by interlocutory decree when there is lack of jurisdiction, lack of merit and lack of equity,—any one of these an "insuperable objection" to the "maintenance of the bill" (*Denver* vs. *New York Trust Co.*, *supra*, p. 71).

In addition to all the considerations demanding the dismissal of the bill and therefore the denial of the interlocutory injunction as matter of right, there is present every circumstance that this Court found controlling as mere matter of discretion in *Cavanaugh* vs. *Looney* (248 U. S., 453, 456-457):

"No such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. *Ex parte Young* [209 U. S., 123, 166]. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable.

"When considered in connection with established rules of law relating to the power of eminent domain, complainants' allegation of threatened 'irreparable loss and damage' appears fanciful. The detailed circumstances negative such view and rather tend to support the contrary one. Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny a federal right the appropriate and adequate remedy by review here is obvious."[1]

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[1]The New York Appellate Division, in an unanimous opinion by Judge Blackmar, reversed an order of temporary injunction against the Palisades Park Commission in *Ramapo Mts. Water, Power & Service Co.* vs. *Commissioners*, supra. Judge Cropsey and Judge Callaghan, in the only cases of the sort that arose after the principles of the subject had been settled by the first *Pauchogue* opinion in the Court of Appeals, sharply denied applications for interlocutory injunctions against the Long Island Park Commission (*Flagg* vs. *Long Island State Park Commission*, N. Y. L. J., Aug. 3, 1926; *Rasweiler* vs. *Long Island State Park Commission*, N. Y. L. J., April 29, 1927).

CONCLUSION.

The Statutory Court ruled that the State Legislature must make, in advance of the taking of any piece of real property, a "separate appropriation in such an amount as to be reasonably certain to cover an award which may reasonably be made for said land." The practical result of the decision is to deprive the State of the most used and most efficient method of exercising its power of eminent domain.

The three judges not only held, in the face of all the rulings of this Court and of the New York Court of Appeals, that the State's promise to pay contained in Section 59 of the Conservation Law is insufficient,—they went further. They declared it an essential of due process that, before a state takes land by entry and appropriation, there shall be "funds *separately* appropriated by the legislature of said state in such an amount as to be reasonably certain to cover an award which may reasonably be made *for said lands*" (Decree, R., 82; also Opinion, R., 93, 95).

This would mean that, in every instance, the Legislature would have to act in advance upon, and appropriate money for, not merely the project, but every particular piece of property. And in practical consequence it would also mean that unless the Legislature set aside in advance funds equal to *the owner's estimate* of the value of his property, the owner could always retake the property by an injunction suit like this in the federal courts.

Under these restrictions, the State could never employ the entry and appropriation process. The restrictions would make it—instead of a summary method, and the most efficient—the most cumbersome as well as the most expensive method imaginable.

No particular piece of property could be appropriated until the questions whether to take it and how much the owner might recover for it in the Court of Claims, had been brought before the Legislature and been the subject of consideration and decision there. Entry and appropriation would become not an administrative, but a legislative, procedure.

And huge amounts would have to be impounded out of the State funds. For there is notoriously a wide discrepancy between the owner's estimate of the value of property in eminent domain and the estimate of the State's officials.[1] The same discrepancy is naturally to be expected between the owner's estimate and the Court of Claims judgment.

Moreover, with the adoption of this so-called constitutional requirement the owner's estimate would in practical effect control: The Legislature's appropriation, however liberal, would never come up to the owner's expectations,—and the validity of the taking in every instance would be at the mercy of the owner's demands.

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[1]See for instance

Pauchogue vs. *Long Island State Park Commission*, 248 N. Y., 635, c. d., 278 U. S., 657,
where the ratio was 3 to 1;

Flagg vs. *Moses*, 132 Misc., 494, aff'd 225 App. Div., 887, leave to appeal denied by N. Y. Ct. of Appeals, Apr. 23, 1929, supra, pp. 38-39,
where the ratio was 6 to 1;

Matter of Middletown, 82 N. Y., 196, 200,
where the ratio was 10 to 1.

In the very case of the acquisition of a Hudson River quarry by the Palisades Commission, the owners of the fee and the quarry company which held the leasehold, made claims in excess of $50,000,000; the condemnation commissioners awarded to these interests a total of $570,000; the courts sustained the award (*Matter of Commissioners of Palisades Interstate Park*, 164 App. Div., 957; the figures appear in the Case and Points on Appeal).

If this decision stands, every entry and appropriation threatens a litigated case.

It was in New York that the entry and appropriation practice had its origin,—in the Erie Canal Act of 1817.[1] After the legislation had been in effect for a generation the New York courts called it "the first efficient statute under which our great system of internal improvements was commenced" (*Rexford* vs. *Knight*, 15 Barb., 627, 642, affirmed 11 N. Y., 308). After a century of use in the acquisition not of canal properties only but in the up-building of a state land system of a million acres, the Court of Appeals quoted and repeated this characterization (*Kahlen* vs. *State of New York*, 223 N. Y., 383, 389). The decision of the Statutory Court, were it to stand, would mean the end of the practice.

[1] N. Y. L., 1817, ch. 262.

The interlocutory decree should be reversed, and the bill dismissed for lack of equity, lack of merit and lack of jurisdiction.

Respectfully submitted,

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